17827

(18,783.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 189.

WILLIAM H. JONES, JOHN HILL, AND EDGAR POE LEE, PLAINTIFFS IN ERROR,

vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA; DAVID Q. EGGLESTON, SECRETARY OF THE COMMONWEALTH OF VIRGINIA; MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS OF VIRGINIA, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of prohibition	2	2
Exhibit A—Constitution of the State of Virginia, adopted by the convention of 1901–'2	29	19
B—Schedule	94	96
Index to constitution	102	104
Index to schedule	114	116
C—An ordinance to provide for the registration of voters under the constitution, &c.	116	119
Order to show cause	140	143
Marshal's return	143	144
Special appearance for defendants	144	145
Order enlarging rule to show cause	145	146
Answer of respondents	146	147
Hearing	161	156

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1903.

	Original.	Print
Memorandum of Mr. Chief Justice Fuller	162	157
Judge Waddill	163	158
Order discharging rule and dismissing petition	164	159
Petition for writ of error	165	160
Assignment of errors	166	161
Order allowing writ of error	171	164
Bond on writ of error	171	164
Order to transmit record	173	166
Writ of error	174	166
Citation	175	167
Marshal's return of service	176	167
Clerk's certificate	177	168

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *Eastern District of Virginia,* } ss:

At a circuit court of the United States within and for the eastern district of Virginia, begun and held in the court rooms at the custom house, in the city of Richmond, on the first Monday of October, being the sixth day of same month, in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable Edmund Waddill, Jr., judge; Morgan Treat, Esq., marshal, and M. F. Pleasants, clerk.

Among other were the following proceedings, to-wit:

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners,
versus
ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Defendants. } In Prohibition. No. 1759.

Be it remembered that afterwards, at the said term, to-wit: on the 14th day of November, 1902, the following petition for writ of prohibition and exhibits were filed:

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, *versus* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia: Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Defendants.	In Prohibition.	No. 1759.

To the honorable judges of said court:

Your petitioners, suing in this behalf of themselves and all others in like case who will come into this cause as parties hereto, state the following cause of action arising under the Constitution and laws of the United States:

First. That they, and each of them, are, and were at the time of the committing of the grievances hereinafter set forth, citizens of the United States, and citizens and residents of the State of Virginia, and of the third district of Virginia, as Federal courts are constituted.

Second. That they, and each of them, are, and were, at the time of the committing of the grievances hereinafter set forth, and still are, lawful voters of the State of Virginia, and as such entitled to vote for a Congressman for the third district of Virginia, as the congressional districts of said State are now constituted, at a general election for members of the House of Representatives of the United States, which should have been held, according to law, in the State of Virginia, Tuesday, November 4th, 1902.

3 Third. That they, and each of them, have, heretofore, for periods varying from sixteen to nine years, been citizens, residents and lawful voters of the Commonwealth of Virginia, under article 3, section 1, of the constitution of Virginia, which was ratified by the vote of the people of that State, July 6th, 1869, and under chapter VIII, section 62, of the Code of Virginia of 1887, enacted pursuant thereto by the General Assembly of Virginia in the year 1881 (Acts 1881–'2 c. 203, p. 214).

Fourth. That said constitution became the organic law of the State of Virginia under the following circumstances:

In the year 1861 a convention of the State of Virginia passed an

ordinance of secession, under which it was attempted to secede from the Federal Union, and to establish new political relations with other States under a new and distinct political compact known as the Confederate States of America. The persons filling the executive, legislative and judicial offices of Virginia, at the time said ordinance was passed, transferred their allegiance from the United States to the Confederate States and organized armed resistance to the authority, jurisdiction and sovereignty asserted over Virginia by the United States.

A war between the forces of the United States and Confederate States ensued, lasting over four years, during the progress of which elections occurred in Virginia from time to time, under a civil government which acknowledged allegiance to the Confederate States of America, so that, prior to the termination of said war, not only had the form of government existing in Virginia before the outbreak of said war disappeared, but the incumbents of all the offices in the State were parsons elected while they were under
4 a government and allegiance hostile to the United States.

The armed forces of the Confederate States and of Virginia were conquered by the forces of the United States in the year 1865, and the persons holding the offices under the civil government of the State fled, and the government administered by them was destroyed, upon the occupation of the capital and territory of Virginia by the armies of the United States.

The only actual government in Virginia from that time forth until the year 1870 was one of military occupation, or appointive civil government, subject to military control; both under the authority and terminable at the pleasure of the Congress of the United States.

The Congress of the United States passed, during the period aforesaid, a series of acts known as the reconstruction acts, framed upon the theory that, after the conquest of Virginia, no republican form of government existed in Virginia, and that it was the duty of the United States to make good to the State the constitutional guarantee of a republican form of government. By one of said acts the people of Virginia were permitted to assemble, frame a constitution, and submit it to Congress, after the legislature elected when said constitution was voted upon had assembled and ratified the amendments known as the XIVth and XVth amendments to the Constitution of the United States. Pursuant to that authority, the people of Virginia met in convention, framed a constitution, ratified it by popular vote July 6, 1869, and elected a legislature; and that legislature met, ratified said constitutional amendments and adjourned until the Congress of the United States should decide and determine whether the constitution adopted as aforesaid was satisfactory.

5 Among other provisions of said constitution were the following:

Art. III. Elective franchise and qualifications for office.

"SEC. 1. Every male citizen of the United States twenty-one years old, who shall have been a resident of this State twelve months, and of the county, city or town in which he shall offer to vote three months next preceding any election, shall be entitled to vote for a member of the General Assembly, and for all officers elected by the people."

The only classes of voters excluded by said constitution from exercising the right of franchise were:

1. Certain designated officers, soldiers, seamen or marines.
2. Idiots and lunatics.
3. Persons convicted of bribery in elections, embesslement of public funds, treason, felony or petty larceny.
4. Persons who had fought a duel, or sent or accepted a challenge, &c.

The Congress of the United States, by an act passed January 26, 1870 (16 U. S. Stat. at Large, p. 62), after a debate upon said proposed constitution, allowed Virginia to resume her relations to the United States, and to send representatives to Congress under said constitution, upon certain fundamental conditions, among which was the following:

"That the constitution of Virginia shall never be so amended or changed as to deprive any citizen, or class of citizens of the United States, of the right to vote, who are now entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law."

And, subject to said conditions which she expressly accepted, under which she has acted for over thirty years, and which she is now estopped from denying or questioning, the State of Vir-
6 ginia was permitted to resume her relations to the United States and to exercise all her ancient sovereign rights, save as they were curtailed, surrendered and limited by her assent to the fundamental conditions aforesaid.

Fifth. Said constitution of Virginia, adopted in 1869, provides, among other things, as follows:

"Article XII. Future changes in the constitution.

"SEC. 2. At the general election, to be held in the year 1888, and in each twentieth year thereafter, and also at such time as the General Assembly may by law provide, the question, 'Shall there be a convention to revise the constitution and amend the same?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors voting at such election shall decide in favor of a convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such convention: Provided, that no amendment or revision shall be made which shall deny or in any way impair the right of suffrage, or any civil or political right as conferred

by this constitution, except for causes which apply to all persons and classes without distinction."

Sixth. Petitioners having freedom and the right of suffrage guaranteed to them by the XIIIth, XIVth and XVth amendments to the Constitution of the United States; by the fundamental conditions of the act of Congress of January 26, 1870; by the constitution of Virginia, adopted in 1869, and by the law of Virginia of 1881, above cited, have hitherto continuously enjoyed said franchise uninterruptedly, until November 4th, 1902. They can read and write, are
7 owners of real and personal property in Virginia, have a visible permanent interest in, and identity with, the State, in which they were born, or have resided the greater portion of their lives.

Seventh. In the year 1900 a political party called the Democratic party held complete control of the executive and judicial offices of Virginia and a large majority in both branches of the legislative department. Being so in control, the Democratic majority of the General Assembly passed an act, approved March 5th, 1900, submitting to the people of Virginia the question, "Shall there be a convention to revise the constitution and amend the same?" at a general election, to be held upon the fourth Thursday in May, 1900.

Eighth. Petitioners aver that, in every method and by all the representative utterances through which political parties give pledges, the Democratic party of Virginia assured the voters of Virginia, that if they voted in favor of said convention any revised and amended constitution which might be framed thereby would be submitted to the voters of Virginia for ratification or rejection. And they verily believe and charge that a vast majority of those who voted in favor of said convention were induced thereto by these assurances given by every representative politician, by the press and by party conventions of all political parties in the State.

Ninth. At the election held in May, 1900, the popular vote favored said convention, and was duly certified to the next General Assembly, which passed an act February 16, 1901, reciting that it was then proper to *rpo*vide plans for the selection of the delegates to such convention, for the convening of said delegates and the organization of the State convention, and for submitting the revised and amended constitution to the people of the State of Virginia for ratification or rejection.

8 Provision was made by said act for electing delegates to said convention on the fourth Thursday in May, 1901, and for the assembling of the convention June 12, 1901, and the act further provided that, if the convention completed its work before October 5, 1901, the constitution framed by it should be submitted to the qualified voters of the Commonwealth as a whole, or by separate articles or sections, as the convention might determine, for the ratification, or rejection, at the general election, to be held November 5, 1901; and that if the work of said convention was not finished

before October 5, 1901, it should remain for the next General Assembly to enact such measures as it should deem proper, for submitting the said constitution to the people of the State for ratification or rejection.

Tenth. Said convention assembled June 12, 1901, and pretended to organize; but a majority of the delegates elected thereto then and there refused to take or subscribe any oath of office, in violation of art. III., sec. 5, of the constitution of Virginia; and no member of said convention ever qualified as such.

Whereby, as petitioners insist and charge, all the proceedings of said convention were null, void and of no effect.

Eleventh. Nevertheless, said convention did attempt to act, and remained in session until June 26, 1902, when it adjourned *sine die*, after pretending to ordain a constitution consisting of 65 pages of printed matter, 8 pages of schedules and 24 pages of registration ordinances, all which are hereto annexed as part hereof, marked Exhibits A, B and C.

Twelfth. Notwithstanding the political pledge above referred to, and the requirements of the act of assembly aforesaid, that the work of said convention should be submitted to the voters of Vir-
9 ginia for ratification or rejection, a bare majority of a quorum of said convention, consisting exclusively of Democrats, refused to submit the said proposed revision and amendment of the constitution to the people of Virginia, or to leave the manner of its submission for ratification or rejection to the next General Assembly of the State.

The proposition to submit the amended and revised constitution to the electorate as constituted under the laws theretofore in force, was rejected by a vote of ayes, 33; noes, 52.

The proposition to submit it to the electorate provided for in said revision and amended constitution was rejected—ayes, 24; noes, 58.

And the proposition, "Shall the constitution framed by this body be ordained by this convention?" was sustained by a vote of ayes, 47; noes, 38.

The affirmative vote by which this outrage was perpetrated was less that a majority of the whole convention.

Forth-seven members attempted, in violation of every pledge given by their party, without any constitutional or statutory authority to act definitively, in defiance of the law under which they were assembled; to impose upon the voters of Virginia as the organic law of the State a constitution embodying many subjects never theretofore embraced in any constitution of Virginia; never submitted to the voters of Virginia for their approval; and framed and intended to disfranchise two-fifths of the voters who elected the delegates to the convention, or as many as the appointed agents of said dominant faction should thereafter see fit to deprive of suffrage.

Thirteenth. The design last referred to is manifest in sundry devices inserted in said constitution under pretence of guarding the electoral franchise as follows:

10 Under the constitution and laws of Virginia, as they existed when said convention was assembled, every lawful voter of Virginia, that is to say, every male citizen of the United States, twenty-one years of age, who had been a resident of the State of Virginia twelve months, and of the county or town in which he offered to vote three months next preceding any election, was entitled to vote, provided he was duly registered.

The registration laws of the State of Virginia then in force provided for a registrar in every election district of all the counties and cities of the State, who held his office for a fixed term, which had not expired when said convention attempted to enact the unlawful measures hereinafter stated. Any voter of the Commonwealth might apply to said registrars for registration, and they were required annually, in May and October, to designate a time and place at which lawful voters might be registered.

Petitioners aver and charge that the dominant faction in said convention wilfully and deliberately planned to destroy the electorate fixed by the then existing constitution of Virginia, and to that end it attempted to repeal the registration law above named, without submitting such action to the people, and contrary to the powers of said convention.

After incorporating into the proposed constitution, as article I. thereof, a bill of rights, which is a mockery of the liberties recited, when contrasted with what follows it, said convention, under article II., headed, "Elective franchise and qualifications for office," attempted to define and fix the qualifications of electors. Pretending to give a vote to every male citizen of the United States, resident in Virginia, twenty-one years of age, said section increased the term of residence of voters in the State to two years, and
11 in the county, city or town to one year, and in the precinct where the citizen offers to vote to thirty days. To those primary qualifications it added requirements that such voters should be registered and should have paid a State tax. Superadded to these and annulling said pretended broad grant of franchise, was the requirement that there should be a new general registration in all the counties, cities and towns of the State during the years 1902 and 1903 at such times and in such manner as might be prescribed by an ordinance of said convention.

In violation of all precedent or authority, and contrary to law, the dominant faction in said convention thereupon, or shortly thereafter, passed an ordinance entitled, "To provide for the registration of voters under said constitution and prior to the year 1904," by the provisions of which registration was ordered, not in the voting districts, as provided by the laws of Virginia then in force, but in the several magisterial districts of every county, and in the wards of every city; thereby changing the territorial areas of registration districts and increasing the physical difficulties of registration.

It provided that said general registration should take place prior to the 15th day of October, 1902, and again prior to the 15th of October, 1903; that the registrars should consist of a board composed

of three citizens resident in such district or ward appointed by said convention; whereby it undertook to change the time for holding registrations, the appointive power and the number of registrars. It restricted said boards to registering any person who applied for registration, except those entitled to register under said constitution prior to January 1, 1904, and gave said boards power to administer oaths and examine under oath any applicants and witnesses;
12 to receive evidence and hear testimony touching qualifications for registration. It further made the act of the majority of the board the act of the board itself. It provided for the delivery of the list of persons so registered to the judges appointed at such precinct to conduct said election; and provided for the prosecution of any person examined by said boards, for perjury. It gave the right of appeal to a rejected voter to the county or corporation court, and thence to the supreme court of appeals, and after sundry other detailed provisions, in order to make more effectual the plans of disfranchisement settled upon by the dominant faction, it descended to the appointment of three designated individuals in every magisterial district of the counties and in every ward of the cities, in the Commonwealth of Virginia, who could be relied upon as partisans of said faction to carry out its plans, whereby none but the persons whom it intended should be registered and allowed to vote would be placed upon the registration lists in any magisterial district or ward of the State of Virginia.

With the machinery thus provided and registration exclusively under control of its appointees, the dominant faction in said convention enacted into the constitution itself that its appointees should only register such voters of Virginia as presented themselves to them and were citizens of the United States, having the qualifications of age and residence aforesaid, and possessing the following additional qualifications:

(1) Certain soldiers; (2) any son of such soldier; (3) owners of property, upon which, for the year next preceding that in which they offered to register they had paid at least one dollar of State taxes; (4) persons able to read any section of said constitution submitted to them by said officers of registration and to give a
13 reasonable explanation of the same; or, if unable to read such section, were able to understand and give a reasonable explanation thereof when read to them by the officers.

Fourteenth. Petitioners aver and charge that the language aforesaid, purporting that every male citizen of the United States, as provided in the constitution of 1869 and required by the fundamental conditions of the act of Congress, should be admitted to register was a mere pretense of granting the right to register, coupled, as it was, with the proviso that such right should only exist when the applicant possessed the other qualifications last hereinbefore named. The act of Congress hereinabove cited expressly forebade the curtailment of the right of suffrage in that manner. So, also, do the XIVth and the XVth amendments to the Constitution of the United States. So, also, does the constitution of Virginia of 1869,

and the laws enacted pursuant thereto. The first and second conditions aforesaid were plainly obnoxious to that clause of the bill of rights which forbids the granting of separate privileges to any man, or set of men, or granting privileges as descendible for service of an ancestor.

The third condition, relating to the ownership of property on which taxes had been paid for the preceding year, was likewise unconstitutional and void.

The fourth proviso, whereby the right of any citizen to exercise his franchise in Virginia was made dependent upon the judgment or caprice of partisan appointees, violated every idea of democratic constitutional liberty.

The autocrat of the Russian empire has no more absolute mastery over the sources or political power in his empire, and is no more potent to control the membership and organization of every representative body in his realm, or the incumbency of every office in his dominion in perpetuity, than has the dominant faction
14 of said convention in Virginia, if said ordinance and constitution are valid.

Fifteenth. The schedule by which it was sought to put said pretended constitution into effect provided that certain lawful electoral boards existing in Virginia prior to the convening of the said convention, and to which electoral boards the appointment of judges of election and registrars was delegated, should remain in office until March 1, 1904, with the powers conferred by existing laws, except the appointment of registrars.

Said schedule further provided that, in all elections held after said pretended constitution went into effect, the qualifications of electors should be those required by the article II. of said pretended constitution therein set forth.

It further provided that said constitution should go into effect on the 10th day of July, 1902, at noon, and directed the governor of Virginia to immediately issue his proclamation, announcing that said revised and amended constitution had been ordained by the people of Virginia, assembled in convention, through their representatives, as the constitution for the government of the people of the State, and that it would go into effect as such, subject to the provisions of said schedule, on the 10th day of July, 1902 / and to call upon the people of Virginia to render their true and loyal support to the same as the organic law of the Commonwealth.

It required that when the General Assembly convened on the 15th day of July, 1902, as it had been summoned to convene, its members and officers, before entering upon the discharge of their duties, should severally take and subscribe the oath or affirmation prescribed by section 34 of said constitution, which was an oath to support the Constitution of the United States and the constitution of the State of Virginia, ordained by the convention which
15 assembled in the city of Richmond on the 12th day of June, 1901.

It is further required that the governor of Virginia, and all other executive officers of the State, whose offices are at the seat of government, and all judges of courts of record, should severally take and subscribe such oath or affirmation, under a penalty of vacation of their offices.

Sixteenth. Petitioners are advised and charge that the governor of Virginia, did forth-with make proclamation as directed by said schedule, and that the governor of Virginia, Andrew J. Montague, and all the other executive officers of the State, whose offices are at the seat of government, and all the judges of the courts of record, took and prescribed the oath required by said schedule, whereby they undertook to support the said alleged constitution; and that the members of the General Assembly, when it assembled on the 15th day of July, 1902, with one or two exceptions, took and subscribed said oath.

Seventeenth. Petitioners aver and charge that the passage of said ordinance creating said boards of registration; the appointments by said convention of the individuals composing said registration boards; the attempted additional qualifications upon the right of suffrage set forth in article II. section 19, of said pretended constitution, and especially said fourth qualification; and the attempt to ordain and proclaim said constitution without submitting it to the people of the State; are each, all and every one of them in violation of the rights of petitioners, destructive of their franchises, ruinous to their property as placing them subject to the control of a spurious and false electorate; in violation of the XIVth and XVth amendments of the Constitution of the United States; in violation of the acts of Congress of January 26, 1870; and in violation of the
16 only existing constitution of Virginia, which was ratified by the people of Virginia July 6th, 1869, and the laws enacted pursuant thereto; and that each, all and every one of said attempted acts, ordinances, appointments, constitution and schedule are null, void and of no effect.

Eighteenth. Petitioners aver and charge that by means of the premises the governor of Virginia, and all other executive officers of the State, the judges of the courts of said State, and the members of the General Assembly of said State, have untied in an attempt to abandon the government of Virginia under which they were elected to office, and that they, and each of them, have, in violation of their duties to the people who elected them, and in conspiracy with the dominant faction in said convention, attempted to ordain and proclaim said constitution and to impose the same upon the people of Virginia as the organic law of Virginia, without their consent, contrary to their will, without giving the people any opportunity to ratify or reject the same; well knowing or believing that the people would never ratify the same; and that all said actings and doings are in violation of the Constitution and laws of the United States and of the State of Virginia. And that each, all and every one of said pretended ordinances, constitution, schedule and proclamations,

and every and all acts done by them, or any of them, under color and pretence of said proceedings, are null, void and of no effect.

Nineteenth. They further aver and charge, and, if permitted to do so, will prove that many of the members of said convention, who voted in favor of ordaining and proclaiming said constitution, avowed a purpose, in framing the same, to disfranchise the great body of the colored voters of Virginia; and that however cunningly the
17 device contained in said instrument may be concealed, the real purpose of the dominant faction which framed, ordained and promulgated said so-called constitution, and of those who have co-operated in the attempt to proclaim and enforce the same, and the effect of said ordinance, constitution and schedule, as the same have been proclaimed, and are attempted to be enforced, has been, and is, to disfranchise the great mass of the colored voters of Virginia, to which class petitioners belong, on account of their race and color; and that said ordinance, constitution and schedule in no material way materially affect injuriously the white men of said State.

Twentieth. They further aver and charge, and, if permitted to do so will prove, that many members of the dominant faction in said convention, who voted in favor of ordaining and proclaiming said so-called ordinance, constitution and schedule, openly admit and declare that they knew said constitution would never be ratified and approved by a majority of the voters of Virginia under the electorate existing when said convention was called, if submitted to them for ratification or rejection; and that, in voting to ordain and proclaim the same, they did so, well knowing that by that means alone, if at all, could said constitution be imposed upon the people of Virginia as the organic law of the State.

Twent*h*-first. Petitioners are further advised and charge that the government of Virginia having passed, by the methods above recited, from under the lawful constitution adopted by the people in the year 1869, to a government under said so-called constitution, the government now existing in Virginia is unlawful, notwithstanding many of the incumbents of office therein were lawfully elected to the offices which they hold.

Twenty-second. After the governor of Virginia had proclaimed said constitution, and the other executive officers and *and*
18 judges of courts of record, and members of the General Assembly, had attorned to said so-called new constitution, as hereinabove set forth, the registration boards appointed by the ordinance of said convention, held their sessions and made up their enrollments in the various magisterial districts and wards of the Commonwealth. Petitioners aver and charge, and, if permitted to do so, will prove, that in every section of the State of Virginia the action of said registration boards was as partisan and unconstitutional and outrageous as might have been expected under the circumstances of their appointment; that said boards hastened in many sections of the Commonwealth to place upon said registration rolls the names of every white male citizen of the United States possessing the qualifications of age and residence, and who was believed to be a Dem-

ocrat; that the said boards made little or no effort to ask such white persons to read any section of said constitution, or to give a reasonable explanation of the same, but quickly and cheerfully admitted all such to register; that said boards, on the contrary, only permitted colored voters to apply for registration at stated times and places, and that when such colored persons presented themselves said boards proceeded at once to ask complicated, difficult and unnecessary questions, and that even in cases where such questions were answered intelligently, applicants for registration were rejected by said boards, they holding that the answers and explanations given to them were not reasonable; and petitioners aver and charge that, by means of the premises, thousands of lawfully-qualified citizens of Virginia, who applied for registration to said registration boards, have been rejected by them, and that many other thousands of lawful voters either refused to recognize said boards as law-
19 fully convened, or were deterred from applying to them by their notoriously partisan and arbitrary conduct.

Twenty-third. Petitioner, Wm. H. Jones, is a colored man, thirty-two years old; was born in Richmond, Virginia, where he has resided all his life, and now resided; has been a lawful voter under the constitution of 1869 for nine years; can read and write, and is owner of real estate in Richmond, Virginia, valued at about $800, on which he pays taxes; is in business as collector of the American Insurance Company and the Richmond Planet newspaper. Petitioner applied to the registration board of Jackson ward, in Richmond, Virginia, for registration in the latter part of September, and was refused registration, either on the understanding clause or as a property owner, although he has committed no offence, and is entitled to vote.

Petitioner, John Hill, is a colored man thirty-eight years old; was born, and has lived all his life, in Richmond, Virginia, and has been a lawful voter for about fifteen years. He can read and write, and owns an interest in, and pays taxes upon, real estate valued at about $500.00; is canvassing agent for the Cable piano, of Richmond, Virginia. He was a qualified voter at the election for delegates to said convention; applied to board of registration in Clay ward, where he lives, about September 26th, 1902, and was refused on ground of not understanding the constitution.

Petitioner Edgar Poe Lee, is a colored man, aged forty-three; born in Virginia; lived in Virginia all his life, except five years, from 1881 to 1886, when he was a private in the United States Army, in "F" Co., 9th U. S. cavalry; served in Arizona, California, New Mexico and Colorado, against the hostile Indians, and has his honorable discharge. Since discharge, in 1886, *and* has resided in Richmond, Virginia. Can read and write. Is a music teacher
20 and leader of a band of musicians. Regular occupation laborer. Applied for registration to the registration board in Jackson ward about September 30th, 1902. Was rejected by the board for reasons best known to themselves. Has been voting in Jackson ward since 1889.

Twenty-fourth. Whereby, as petitioners aver and charge the registration lists made up by same registration boards appointed by the said convention became, and were and are, not only the unlawful registration lists of the congressional electorate of Virginia, but are, as they were intended to be by the faction which designated said registration boards, merely partisan partial lists of such persons of the lawful electorate, as the appointees of said convention saw fit to enroll, exclusive of lawful electors of Virginia to the number of at least — in the State and — in this congressional district.

Twenty-fifth. Under the laws passed by the Congress of the United States, enacted by the State of Virginia prior to the assembling of said convention, an election for Congressmen from the ten congressional districts of Virginia should have been held in the State of Virginia Tuesday, November the 4th, 1902. By reason of the unlawful combination aforesaid between the incumbents of the offices in Virginia, and the dominant faction in said convention, and its appointees, no such election was held. Writs of election were indeed issued by the governor of Virginia in the form prescribed by law; but in taking such action he assumed to act under the Constitution unlawfully proclaimed by him as aforesaid. Judges of election at the several voting precincts of the State of Virginia were indeed appointed for said election, but the electoral boards and judges aforesaid did not take the oath to support the lawful constitution of Virginia, and only took the oath to support said spurious constitution; and whatever color of authority said election boards and judges
21 may have had, by reason of the electoral boa-ds having been selected prior to the attempted proclamation of said constitution, said attempted elections were null, void and of no effect, for the further reason that the lawfully registered voters of the Commonwealth were denied the right of suffrage of said election, and the lawful registration lists existing in every election precinct of the State were ignored and excluded at said elections, while, on the contrary, the only registration lists referred to or admitted by said judges upon which alone voters were permitted to vote, were spurious and unlawful registration lists made up by the illegal and partisan registration boards designated by the ordinance of said convention; whereby said elections for representatives in Congress were conducted in violation of the laws of the State of Virginia in all respects; without the registration lists required by law; without the officers conducting same having taken the oath required by law; and were and are in all respects null, void and of no effect.

Twenty-sixth. At said election the candidates for Congress in the third congressional district aforesaid were as follows: John Lamb was the candidate of the Democratic party, and William E. Talley and B. W. Edwards were candidates of the Republican party. The votes cast at said pretended election, in said district, were never published, but whatever they may be, it was a foregone conclusion before said illegal election was held, that said Democratic candidate would receive a very large vote, and said Republican candidate

would receive a very small vote, because, by the partisan and unlawful methods by which the registration lists were made up, upon which alone voters were permitted to vote, it was certain that substantially all the Democratic voters in the district who applied for registration would be placed upon said list, and that just as many Republican voters would be excluded therefrom as the partisan registration boards saw fit to exclude.

22 Twenty-seventh. Under the laws of Virginia, enacted prior to the convening of said convention, and still recognized as in force by the schedule of said constitution, the governor of Virginia, the secretary of the Commonwealth, the auditor of public accounts, the State treasurer and attorney-general, or any three of them, are constituted a board of State canvassers. The present incumbents of these offices are as follows—to-wit:

Andrew J. Montague is the governor of the State of Virginia; David Q. Eggleston is secretary of the Commonwealth; Morton Marye is auditor of public accounts; Asher W. Harman, Jr., is State treasurer, and Wm. A. Anderson is attorney-general.

After an election the judges of each voting precinct are required by law to make up the returns of the vote cast in their respective precincts, and transmit them to the clerk of the court of the county or corporation in which the election is held. The electoral board of each county and city, when it appoints election judges, designates five of the persons appointed to act as commissioners, who, or any three of whom, constitute a board, of which the clerk of the county, corporation or hustings court is *ex-officio* clerk. These commissioners meet at the clerk's office of their respective counties or corporations on the second day (which in this case is Thursday, November 6th) after the election and pass upon the returns made at the clerk's office; said commissioners ascertain from the returns the persons who have received the greatest number of votes in the county or corporation of the several offices to be filled at said election. The clerk is required to make out abstracts of the votes, and said abstracts certified and signed by said commissioners and attested by the clerk, are deposited in the clerk's office, and certified

23 copies thereof, under the official seal of the clerk, are transmitted to the secretary of the Commonwealth.

In case of elections for representatives in Congress, the secretary of the Commonwealth, upon receipt of the certified abstracts of the votes given in the several counties and corporations constituting a congressional district, is required to proceed to open the same and record them in a suitable book, and to preserve in his office said abstracts for the purpose of canvassing the results of elections.

Said board of State canvassers is required to meet at the office of the secretary of the Commonwealth on the fourth Monday in November after the election (which, in the present year, is Monday, November the 24th) when, upon the certified abstracts on file in the office of the secretary of the Commonwealth, it is required to proceed to examine and make statement of the whole number of votes given at such election for representatives in Congress, which state-

ment shall show the names of persons for whom such votes have been given for said office, and the whole number given to each, distinguishing the several districts, cities and counties in which they were given; it is also required to certify the said statement to be correct and the members of said board must subscribe their names thereto, and said board is required to thereupon determine what persons have been, by the greatest number of votes, duly elected Congressmen from the ten several congressional districts of Virginia, and to endorse and subscribe on such statements a certificate of such determination, and deliver them to the secretary of the Commonwealth. The secretary of the Commonwealth is required to record in a suitable book each certified statement or determination as made by the board of State canvassers, and without delay make out and transmit to each of the persons thereby declared to be elected
24 a certificate of his election certified by him under his seal of office.

Twenty-eighth. Petitioners aver and charge that each, all and every one of the proceedings had and taken by the governor of Virginia, the secretary of the Commonwealth, the several electoral boards in the State of Virginia, the judges and clerks of election, and all the other officers, to whom duties concern- election are committed by the laws of Virginia, have, in so far as they relate to the election required by law to be held in the State of Virginia November 4th, 1902, for representatives in Congress of the United States, been null, void and of no effect; that each, all and every one of said proceedings have been contrary to law, in violation of complainants' rights, and unconstitutional, and that no election for representatives in Congress was held in the State of Virginia November 4th, 1902.

Twenty-ninth. Nevertheless, petitioners are advised that the judges of election appointed in and for the several election precincts in the third congressional district of Virginia did pretend to hold such an election November 4th, 1902, using only said spurious registration lists at said election; that said precinct judges did certify to the clerks of their respective counties the votes which were cast thereat on the day aforesaid; that the board of canvassers in the several counties and cities in said third congressional district did assemble at their respective court-houses upon the 6th day of November, 1902, and did certify abstracts of the votes cast in their counties and cities, respectively, to the secretary of the Commonwealth at Richmond, Virginia, and that said board of State canvassers will assemble at the capital upon the 24th day of November, 1902, and will then and there, unless prohibited from doing so, proceed to treat said pretended election returns, as if they were the returns
25 of a lawful election; and will, from the spurious certified abstracts on file in the office of the secretary of the Commonwealth, proceed to examine and make up statements of the whole number of votes given at said spurious election for representatives in Congress, and to certify such statements to be correct, and to subscribe their named thereto, and to determine what persons were, by

the greatest number of votes, duly elected to such offices, and to endorse and subscribe on such statement a certificate of such determination and to deliver them to the secretary of the Commonwealth; and that said secretary of the Commonwealth will, unless prohibited from so doing, *will* record said certified statement of determination, and will without delay make out and transmit to each of the persons thereby declared to be elected, a false and spurious certificate of his election as a representative in Congress, certified by him under his seal of office.

Thirtieth. Petitioners aver and charge that such action on the part of said board of State canvassers would inflict upon petitioners, and each of them, great and irreparable injury; that the injury to them is great because the action of said board of State canvassers, if permitted to be taken, will give effect to void and invalid enactments, proclamations and proceedings as laws which control and govern the persons and properties, liberties, franchises and immunities of petitioners, notwithstanding said enactments, proclamations and proceedings have never been, and are not, valid or binding upon complainants, or upon any citizen of Virginia as laws of said Commonwealth. That said injury is irreparable, because it is of such a character that, unless it is prohibited, it can never be repaired. Complainants are freemen and voters in their respective communities, and the damage done to them in their persons and property by these spurious and invalid proceedings, which deprive them of their franchises, take away liberty guaranteed to
26 them by the Constitution of the United States and the laws of Congress, and deprive them of all voice in the Government which taxes them, is an injury which is irreparable and intolerable, even if it should be permitted to exist but for a single minute.

Thirty-one. Petitioners aver that the plain official duty of said board of State canvassers was, and is, to receive, consider, canvass and certify, only returns of elections held pursuant to the provisions of the constitution of Virginia, which was ratified by the people of Virginia, July 6th, 1869, and approved by Congress as aforesaid, or the laws of Virginia enacted pursuant thereto, especially those relating to suffrage and registration, and none others; and that any attempt on the part of the State board of canvassers to recognize as valid, consider, canvass or certify returns of any election held under any other law or laws, especially under ordinances, constitutions, schedules, or proclamations of an alleged convention of Virginia which assembled at Richmond, June 12th, 1901, is a positive official act plainly violating the oath of office, and official duty, of the members of said board, and is part and parcel of a conspiracy combination arbitrarily, capriciously and unlawfully entered into as aforesaid between the members of said board, and the faction attempting to enact, ordain and proclaim said ordinances, constitution and schedule, to overthrow the government of Virginia, transcend the jurisdiction of said board, is "*ultra vires*," null and void. That such action is designed to, and does, oppress petitioners and deprive them of their franchises as voters, their right to representation in the Con-

gress of the United States, abridges their privileges and immunities as citizens of the United States in the State of Virginia, deprives them of their liberty and property, without due process of the
27 law, denies them the equal protection of the laws, and denies and abridges to them, as citizens of the United States, the right to vote in the State of Virginia, on account of their race, color, or previous condition of servitude.

And petitioners aver and charge that said board of canvassers and the several members thereof will, unless they shall be prohibited from so doing, meet upon the 24th day of November, 1902, at Richmond, Virginia, and commit the acts last hereinabove set forth, as threatened by them, in violation of law, in excess of their jurisdiction, and to the irreparable injury of the liberty, franchises, privileges, immunities and property of petitioners.

Wherefore, your petitioners pray that this honorable court will issue, or cause to be issued, a writ of prohibition, directed to and against said Andrew J. Montague, who is governor of Virginia; David Q. Eggleston, who is secretary of the Commonwealth of Virginia; Morton Marye, who is auditor of public accounts of Virginia; Asher W. Harman, Jr., who is State treasurer of Virginia; and Wm. A. Anderson, who is attorney-general of Virginia, constituting the board of State canvassers of Virginia, prohibiting them, and each of them, from considering, canvassing, counting, determining upon, or certifying or otherwise acting upon, any returns or abstracts of returns in the office of the secretary of the Commonwealth of Virginia, purporting to be returns of election held in the State of Virginia, Tuesday, November 4th, 1902, for representatives in Congress from the State of Virginia, or in any wise dealing with or certifying the results of said returns as returns of a lawful election, held in Virginia on the date aforesaid. That by reason of the matters and things hereinabove set forth, said pretended election, and any and all precinct, county, district or State returns made
28 thereunder, may be held to be null, void and of no effect, and the said board of State canvassers, and the members thereof, may be prohibited from in any wise proceeding to act upon the same as lawfully before them for their consideration.

That pending the hearing, and until the final decision upon this petition for said writ of prohibition an order may be granted by this honorable court suspending any and all proceedings, on the part of said board of State canvassers and the members thereof upon any and all the matters sought to be prohibited until the final decision of this cause. And for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual.

And petitioners will ever pray, &c.

WILLIAM H. JONES.
JOHN HILL.
EDGAR POE LEE.

STATE OF VIRGINIA, *City of Richmond,* } *To-wit:*

This day personally appeared before me, the undersigned, deputy clerk United States circuit court for the eastern district of Virginia, William H. Jones, John Hill and Edgar Poe Lee, whose names are signed to aforegoing petition, bearing date 14th day of November, 1902, who, being by me duly sworn, made oath that the facts set forth in such petition, so far as stated as of their own knowledge are true, and so far as the same are stated upon knowledge derived from others, they believe them to be true.

Witness my hand and official seal this 14th day of November, 1902.

[SEAL.]

JOSEPH P. BRADY,
Deputy Clerk U. S. Circuit Court,
Eastern District of Virginia.

17837
19

THE

CONSTITUTION

OF THE

STATE OF VIRGINIA,

ADOPTED BY THE

CONVENTION OF 1901-2.

PUBLISHED BY AUTHORITY.

RICHMOND:

1902.

17838
21

TABLE OF CONTENTS.

ARTICLE I.

BILL OF RIGHTS.

SEC. 1. Equality and rights of men.
SEC. 2. People the source of power.
SEC. 3. Government instituted for common benefit.
SEC. 4. No man entitled to exclusive emoluments or privileges; offices not to be hereditary.
SEC. 5. Legislative, executive and judicial departments of States should be separate; elections should be periodical.
SEC. 6. Elections to be free.
SEC. 7. Laws should not be suspended.
SEC. 8. Concerning criminal prosecutions generally.
SEC. 9. Excessive bail or fines and cruel and unusual punishments prohibited.
SEC. 10. General warrants of search or seizure prohibited.
SEC. 11. No person to be deprived of property without due process of law; trial by jury to be held sacred.
SEC. 12. Freedom of the press and of speech.
SEC. 13. Militia the proper defence of a free State; standing armies should be avoided; military should be subordinate to civil power.
SEC. 14. Government should be uniform.
SEC. 15. Qualities necessary to preservation of free government.
SEC. 16. Religious freedom.
SEC. 17. Construction of the Bill of Rights.

ARTICLE II.

ELECTIVE FRANCHISE AND QUALIFICATIONS FOR OFFICE.

SEC. 18. Qualifications of voters.
SEC. 19. Registrations of voters; who are entitled to register prior to 1904.
SEC. 20. Who may register after 1904.
SEC. 21. Conditions for voting.
SEC. 22. Payment of poll tax by veterans of Civil War not prerequisite to their right to vote; when payment of poll tax enforced.
SEC. 23. Persons excluded from registering and voting.
SEC. 24. Who not deemed to have gained legal residence.
SEC. 25. Directions to General Assembly in regard to registration and transfers.

SEC. 26. Persons qualified to vote at next election shall be admitted to registration.
SEC. 27. Method of voting.
SEC. 28. Ballots.
SEC. 29. Privileges of voters during elections.
SEC. 30. General Assembly may prescribe property qualification for voting in county, city or town elections.
SEC. 31. Electoral boards; appointment and composition; powers and duties of; who ineligible.
SEC. 32. Qualifications of officers and of notaries public.
SEC. 33. When terms of officers to begin and end.
SEC. 34. Oath to be prescribed.
SEC. 35. Primary elections, who may vote.
SEC. 36. General Assembly shall enact laws to regulate elections.
SEC. 37. Voting machines.
SEC. 38. Duties of treasurers, clerks of county and corporation courts and sheriffs in regard to making, filing, delivering and posting list of unpaid poll taxes; how same corrected.

ARTICLE III.

DIVISIONS OF POWERS.

SEC. 39. Departments to be distinct.

ARTICLE IV.

LEGISLATIVE DEPARTMENT.

SEC. 40. General Assembly to consist of Senate and House of Delegates.
SEC. 41. Number and election of senators.
SEC. 42. Number and election of delegates.
SEC. 43. Apportionment of State into senatorial and house districts.
SEC. 44. Qualifications of senators and delegates; who ineligible; removal from district vacates office.
SEC. 45. Salaries of members of General Assembly to be fixed by law; members not to be elected or appointed to civil offices of profit except by election by the people.
SEC. 46. Time and duration of meetings of General Assembly; adjournments; majority shall be a quorum; power of smaller number than a quorum.
SEC. 47. Powers of each house of General Assembly to elect its presiding officer, make its own rules, fill vacancies, and judge of the election and qualification of members, and punish and expel members.
SEC. 48. Privileges of members of General Assembly.
SEC. 49. Journal of proceedings.
SEC. 50. Enactment of laws; tax laws shall specifically state the tax and require a vote of majority of members.
SEC. 51. Standing committee on special, private and local legislation.

1783
23

SEC. 52. Law shall embrace but one object, which shall be expressed in its title; how laws revived or amended.
SEC. 53. Time when laws take effect.
SEC. 54. Impeachments; proceeding under; extent of judgment under; indictment, etc., to lie.
SEC. 55. Apportionment of State into congressional districts by General Assembly.
SEC. 56. Directions to General Assembly concerning elections and declaring offices vacant.
SEC. 57. Power of General Assembly to remove disabilities.
SEC. 58. Prohibitions on General Assembly as to suspension of writ of *habeas corpus*, and enactment of laws referring to religion and other laws.
SEC. 59. General Assembly shall not incorporate churches or religious denominations; may secure church property.
SEC. 60. Lotteries and sale of lottery tickets prohibited.
SEC. 61. Formation and division of counties.
SEC. 62. Power of General Assembly to enact liquor laws.
SEC. 63. Powers which General Assembly shall confer on courts; cases in which General Assembly shall not enact special laws.
SEC. 64. General Assembly shall enact general laws in cases mentioned in preceding section, and wherever general laws will apply; amendment or partial repeal of general law shall not enact special law; restrictions as to laws.
SEC. 65. Powers of local and special legislation may be conferred by General Assembly, by general law, on supervisors and councils.
SEC. 66. Clerk of House of Delegates to be Keeper of the Rolls, without compensation; General Assembly shall prescribe number and compensation of its clerks and employees.
SEC. 67. Limitations on appropriations by General Assembly to charitable and other institutions; exceptions.
SEC. 68. Auditing Committee, appointment and constitution; powers and duties.

ARTICLE V.

EXECUTIVE DEPARTMENT.

SEC. 69. Governor, term of office.
SEC. 70. How and when elected; how result ascertained; how tie or contested elections decided.
SEC. 71. Qualifications of Governor.
SEC. 72. His place of residence and salary.
SEC. 73. Duties and powers of Governor.
SEC. 74. Further powers of Governor.
SEC. 75. Commissions and grants; how they shall run and how attested.
SEC. 76. Bills, duties of Governor in regard to; proceedings of General Assembly in passing bills over veto of Governor; effect of failure of Governor to sign.
SEC. 77. Lieutenant-Governor, election and qualifications.
SEC. 78. Duties of Lieutenant-Governor.

SEC. 79. Lieutenant-Governor shall be President of Senate; compensation as such.
SEC. 80. Secretary of the Commonwealth, election and duties; disposition of fees received by him.
SEC. 81. State Treasurer.
SEC. 82. Auditor of Public Accounts.
SEC. 83. Salaries of officers of Executive Department.
SEC. 84. Checks and balances on officers entrusted with collection of revenue, establishment of.
SEC. 85. Bond of officers handling state funds.
SEC. 86. Bureau of Labor and Statistics.

ARTICLE VI.

JUDICIARY DEPARTMENT.

SEC. 87. Composition and jurisdiction.
SEC. 88. Supreme Court of Appeals, composition and jurisdiction; exceptions to jurisdiction; temporary vacancies, how filled.
SEC. 89. Special Court of Appeals.
SEC. 90. Opinions of Supreme Court of Appeals shall be written.
SEC. 91. Qualifications and terms of judges of Supreme Court of Appeals; how chosen.
SEC. 92. Officers of Supreme Court of Appeals.
SEC. 93. Sessions of Supreme Court of Appeals.
SEC. 94. Judicial circuits, number and constitution.
SEC. 95. Powers of General Assembly to rearrange judicial circuits; limitations.
SEC. 96. Circuit judges, election, qualifications; residence and term of office.
SEC. 97. Terms of circuit courts; judges may be required to hold terms in other circuits.
SEC. 98. Division of cities into classes; courts of each class; additional courts for cities, how provided; abolition and cessation of corporation or city court.
SEC. 99. Judges of city courts, election, qualifications and residence; residence and privilege of judge of corporation court of city of less than five thousand inhabitants; judges of city courts of cities of first class may be required or authorized to hold terms in other circuits.
SEC. 100. Courts of Land Registration.
SEC. 101. Clerks of circuit courts, jurisdiction in cases of wills, insane persons, etc.
SEC. 102. Judges, how commissioned; salaries and allowances, terms of office; vacancies.
SEC. 103. Salaries of judges.
SEC. 104. Removal of judges for cause.
SEC. 105. Judges shall not practice law or hold office of public trust; exception.
SEC. 106. Writs and indictments.
SEC. 107. Attorney-General, election, commission, duties and compensation; how removable.
SEC. 108. Justices of the peace.
SEC. 109. Applications for bail.

17840

ARTICLE VII.

ORGANIZATION AND GOVERNMENT OF COUNTIES.

SEC. 110. County officers, number, terms and compensation.
SEC. 111. Magisterial districts, supervisors; how chosen, powers and duties.
SEC. 112. Elections for county and district officers, when held; terms of officers.
SEC. 113. No person shall hold more than one office at the same time. Additional security may be required of officer.
SEC. 114. County not responsible for acts of sheriff.
SEC. 115. Examination of books, accounts, etc., of officers handling public funds.

ARTICLE VIII.

ORGANIZATION AND GOVERNMENT OF CITIES AND TOWNS.

SEC. 116. Definitions of "cities" and "towns."
SEC. 117. General Assembly shall enact general laws for government of cities and towns; how special act therefor passed: as to city charters existing at adoption of Constitution.
SEC. 118. Clerks of city courts, elections, duties and number; only one in city of less than thirty thousand inhabitants.
SEC. 119. Commonwealth's Attorney in cities; Commissioner of Revenue in cities.
SEC. 120. City officers, their titles, election, powers and duties.
SEC. 121. City council, composition, how elected, powers and duties; ineligibility of members to certain offices; powers and duties as to reapportionments; when *mandamus* against council lies.
SEC. 122. Election and terms of office of city officers.
SEC. 123. Ordinances, proceedings to pass over veto of Mayor; as to appropriation ordinances vetoed.
SEC. 124. Consent of corporate authorities necessary to use of streets, alleys, or public grounds by certain companies or persons.
SEC. 125. Sale of corporate property and granting of franchises by cities and towns.
SEC. 126. Corporate limits, contraction or extension of, General Assembly shall provide for.
SEC. 127. Concerning bonded indebtedness of cities and towns.
SEC. 128. Assessment of real estate therein.

ARTICLE IX.

EDUCATION AND PUBLIC INSTRUCTION.

SEC. 129. Free schools to be maintained.
SEC. 130. State Board of Education, composition; vacancies, how filled.
SEC. 131. Superintendent of Public Instruction, how elected, term of office; how vacancies filled, duties.

SEC. 132. Powers and duties of State Board of Education.
SEC. 133. School districts; school trustees.
SEC. 134. Literary fund.
SEC. 135. Appropriations for school purposes, school age.
SEC. 136. Local school taxes.
SEC. 137. Agricultural, normal, manual training and technical schools.
SEC. 138. Compulsory education; exceptions.
SEC. 139. Free text-books.
SEC. 140. Mixed schools prohibited.
SEC. 141. State appropriations prohibited to schools or institutions of learning not owned or exclusively controlled by State or some subdivision thereof; exceptions to rule.
SEC. 142. Boards of visitors and trustees of educational institutions, how appointed, and term of office.

ARTICLE X.

AGRICULTURE AND IMMIGRATION.

SEC. 143. Department of agriculture and immigration, where maintained, how controlled, composition, qualification of members, how appointed and term of office.
SEC. 144. Powers and duties of same.
SEC. 145. Commissioner of Agriculture and Immigration; term of office; how elected; powers and duties.
SEC. 146. President of Agriculture and Immigration to be *ex-officio* member of Board of Visitors of Virginia Polytechnic Institute.

ARTICLE XI.

PUBLIC INSTITUTIONS AND PRISONS.

SEC. 147. State penitentiary.
SEC. 148. Board of directors of same, number, how appointed, powers; superintendents and surgeons.
SEC. 149. Boards of directors for State hospitals for the insane, number of members; how appointed, powers and terms of office.
SEC. 150. General board of directors of State Hospital for the Insane, composition and powers.
SEC. 151. Superintendents of State Hospital for the Insane; how appointed; how and for what removable; powers; how other resident officers of insane hospitals appointed; terms of office of superintendents.
SEC. 152. Commissioner of State Hospitals for the Insane; how appointed; term of office, powers and duties; bond, salary.

ARTICLE XII.

CORPORATIONS.

SEC. 153. Definition of terms used in article; article not to conflict with Federal Constitution.

17841

SEC. 154. As to chartering of corporations and legislation relating thereto by General Assembly; surrender of charters; special acts regulating corporations prohibited.
SEC. 155. State corporation commission; how appointed; term of office; how vacancies filled; who ineligible; qualifications of at least one member; how removed or impeached; officers, how elected; rules of order and procedure; general provisions; salaries; election of members after January 1, 1908; how vacancies then filled.
SEC. 156. Powers, duties and method of procedure of commission.
SEC. 157. Fees from corporations.
SEC. 158. Effect of amendment of previously obtained charter of corporation.
SEC. 159. Eminent domain and police power of State never abridged.
SEC. 160. Concerning rates of transportation and transmission companies.
SEC. 161. Free transportation of members of General Assembly and of state, county, district, or municipal officers, except members and officers of state corporation commission, prohibited; penalty; policeman and fireman excepted.
SEC. 162. Fellow-servant doctrine abolished to extent stated.
SEC. 163. As to foreign corporations.
SEC. 164. Right of regulation and control of common carriers and public service corporations never surrendered or abridged.
SEC. 165. General Assembly shall enact laws preventing trusts, combinations and monopolies inimical to the public welfare.
SEC. 166. Right to parallel railroads; as to building road parallel to Richmond, Fredericksburg and Potomac Railroad Company; duties of connecting railroads.
SEC. 167. Concerning issuance of stocks and bonds by corporations; penalty for violation.

ARTICLE XIII.

TAXATION AND FINANCE.

SEC. 168. Taxable property; taxes shall be uniform as to class of subjects and levied and collected under general laws.
SEC. 169. How property assessed; General Assembly may grant cities and towns right to reduce taxation for a period of years on land added to corporate limits; right of General Assembly to segregate property for purposes of taxation.
SEC. 170. Income, license and franchise taxes; paving and sewer taxes; abutting land owners.
SEC. 171. Reassessments of real estate.
SEC. 172. Assessment of coal and mineral lands.
SEC. 173. State, county, and municipal capitation taxes.
SEC. 174. Statute of limitations shall not run against state taxes; failure to assess not to defeat subsequent assessment and collection of taxes; exception as to *bona fide* purchaser for value.
SEC. 175. Natural oyster beds.
SEC. 176. Assessment and taxation of railroad and canal companies.

SEC. 177. Franchise tax of railroad and canal companies.
SEC. 178. Amount and ascertainment of such franchise tax.
SEC. 179. Reports of corporations to Corporation Commission.
SEC. 180. Application by corporation for relief from assessment for taxation; proceedings thereunder.
SEC. 181. Taxation of corporations as stated in sections 176 to 180 inclusive to remain fixed from January 1, 1903, to January 1, 1913, and thereafter until modified by General Assembly.
SEC. 182. Taxation of shares of stock of trust or security companies and incorporated banks.
SEC. 183. Property exempt from taxation.
SEC. 184. Contraction of debts and issue of evidences of indebtedness by State prohibited with certain exceptions.
SEC. 185. Lending of credit to, or subscription to stock of, corporations or persons by state, county, city or town prohibited; State shall become interested in no work of internal improvement except public roads. Exception as to counties, cities and towns.
SEC. 186. Collection and disposition of state revenue; payment of money from state treasury; what appropriations shall not be made.
SEC. 187. Sinking fund for state debt; every law creating a debt to provide for a sinking fund for its payment.
SEC. 188. Limit of tax or revenue.
SEC. 189. Rate of taxation; application of proceeds; pensions.

ARTICLE XIV.

MISCELLANEOUS PROVISIONS.

SEC. 190. Homestead exemptions; when not to apply.
SEC. 191. In what property homestead exemptions cannot be claimed.
SEC. 192. Manner and conditions on which homestead may be set apart, to be prescribed by General Assembly.
SEC. 193. Homestead previously claimed not invalidated.
SEC. 194. Stay laws prohibited; exception.
SEC. 195. Heirs of property; children of slaves.

ARTICLE V.

FUTURE CHANGES IN THE CONSTITUTION.

SEC. 196. Amendments.
SEC. 197. Constitutional Convention; how called.

17842

17843
31

CONSTITUTION OF VIRGINIA.

Whereas, pursuant to an act of the General Assembly of Virginia, approved March the fifth, in the year of our Lord nineteen hundred, the question, "shall there be a convention to revise the Constitution and amend the same?" was submitted to the electors of the State of Virginia, qualified to vote for members of the General Assembly, at an election held throughout the State on the fourth Thursday in May, in the year nineteen hundred, at which election a majority of the electors so qualified voting at said election did decide in favor of a convention for such purpose; and,

Whereas, the General Assembly at its next session did provide by law for the election of delegates to such convention, in pursuance whereof the members of this convention were elected by the good people of Virginia, to meet in convention for such purpose.

We, therefore, the people of Virginia, so assembled in Convention through our representatives, with gratitude to God for His past favors, and invoking His blessings upon the result of our deliberations, do ordain and establish the following revised and amended Constitution for the government of the Commonwealth:

ARTICLE I.

BILL OF RIGHTS.

A DECLARATION OF RIGHTS, made by the representatives of the good people of Virginia assembled in full and free Convention; which rights do pertain to them and their posterity, as the Basis and Foundation of Government.

Section 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity;

namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Sec. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

Sec. 3. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; of all the various modes and forms of government, that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

Sec. 4. That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator or judge to be hereditary.

Sec. 5. That the legislative, executive, and judicial departments of the State should be separate and distinct; and that the members thereof may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by regular elections, in which all or any part of the former members shall be again eligible, or ineligible, as the laws may direct.

Sec. 6. That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.

Sec. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

Sec. 8. That no man shall be deprived of his life, or liberty, except by the law of the land, or the judgment of his peers; nor shall any man be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offence, but an appeal may be

17844

allowed to the Commonwealth in all prosecutions for the violation of a law relating to the state revenue.

That in all criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; provided, however, that in any criminal case, upon a plea of guilty, tendered in person by the accused, and with the consent of the attorney for the Commonwealth, entered of record, the court shall, and in a prosecution for an offence not punishable by death, or confinement in the penitentiary, upon a plea of not guilty, with the consent of the accused, given in person, and of the attorney for the Commonwealth, both entered of record, the court, in its discretion, may hear and determine the case, without the intervention of a jury; and, that the General Assembly may provide for the trial of offences not punishable by death, or confinement in the penitentiary, by a justice of the peace, without a jury, preserving in all such cases, the right of the accused to an appeal to and trial by jury in the circuit or corporation court; and may also provide for juries consisting of less than twelve, but not less than five, for the trial of offences not punishable by death, or confinement in the penitentiary, and may classify such cases, and prescribe the number of jurors for each class.

Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Sec. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Sec. 11. That no person shall be deprived of his property without due process of law; and in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred; but the General Assembly may limit the number of jurors for civil cases in circuit and corporation courts to not less than five in cases now cognizable by justices of the peace, or to not less than seven in cases not so cognizable.

Sec. 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments; and any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right.

Sec. 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free state; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Sec. 14. That the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

Sec. 15. That no free government, or the blessing of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.

Sec. 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other.

Sec. 17. The rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people not therein expressed.

ARTICLE II.

ELECTIVE FRANCHISE AND QUALIFICATIONS FOR OFFICE.

Sec. 18. Every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city, or town one year, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his state poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

Sec. 19. There shall be general registrations in the counties, cities and towns of the State during the years nineteen hundred and two and nineteen hundred and three at such times and in such manner as may be prescribed by an ordinance of this Convention. At such registrations every male citizen of the United States having the qualifications of age and

residence required in section Eighteen shall be entitled to register, if he be:

First. A person who, prior to the adoption of this Constitution, served in time of war in the army or navy of the United States, of the Confederate States, or of any state of the United States or of the Confederate States; or,

Second. A son of any such person; or,

Third. A person, who owns property, upon which, for the year next preceding that in which he offers to register, state taxes aggregating at least one dollar have been paid; or,

Fourth. A person able to read any section of this Constitution submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

A roll containing the names of all persons thus registered, sworn to and certified by the officers of registration, shall be filed, for record and preservation, in the clerk's office of the circuit court of the county, or the clerk's office of the corporation court of the city, as the case may be. Persons thus enrolled shall not be required to register again, unless they shall have ceased to be residents of the State, or become disqualified by section Twenty-three. Any person denied registration under this section shall have the right of appeal to the circuit court of his county, or the corporation court of his city, or to the judge thereof in vacation.

Sec. 20. After the first day of January, nineteen hundred and four, every male citizen of the United States, having the qualifications of age and residence required in section Eighteen, shall be entitled to register, provided:

First. That he has personally paid to the proper officer all state poll taxes assessed or assessable against him, under this or the former Constitution, for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; and,

Second. That, unless physically unable, he make application to register in his own hand-writing, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted, and, if so, the state, county, and precinct in which he voted last; and,

Third. That he answer on oath any and all questions affecting his qualifications as an elector, submitted to him by the officers of registration, which questions, and his answers thereto, shall be reduced to writing, certified by the said officers, and preserved as a part of their official records.

Sec. 21. Any person registered under either of the last two sections, shall have the right to vote for members of the General Assembly and all officers elective by the people, subject to the following conditions:

That he, unless exempted by section Twenty-two, shall, as a prerequisite to the right to vote after the first day of January, nineteen hundred and four, personally pay, at least six months prior to the election, all state poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote; provided that, if he register after the first day of January, nineteen hundred and four, he shall, unless physically unable, prepare and deposit his ballot without aid, on such printed form as the law may prescribe; but any voter registered prior to that date may be aided in the preparation of his ballot by such officer of election as he himself may designate.

Sec. 22. No person who, during the late war between the States, served in the army or navy of the United States, or the Confederate States, or any state of the United States, or of the Confederate States, shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote. The collection of the state poll tax assessed against any one shall not be enforced by legal process until the same has become three years past due.

Sec. 23. The following persons shall be excluded from registering and voting: Idiots, insane persons, and paupers; persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretences, embezzlement, forgery, or perjury; persons who, while citizens of this State, after the adoption of this Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such duel, either within or without this State, or knowingly conveyed a challenge, or aided or assisted in any way in the fighting of such duel.

Sec. 24. No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof, by reason of being stationed therein; nor shall an inmate of any charitable institu-

17846
37

tion or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution.

Sec. 25. The General Assembly shall provide for the annual registration of voters under section Twenty, for an appeal by any person denied registration, for the correction of illegal or fraudulent registration, thereunder, and also for the proper transfer of all voters registered under this Constitution.

Sec. 26. Any person who, in respect to age or residence, would be qualified to vote at the next election, shall be admitted to registration, notwithstanding that at the time thereof he is not so qualified, and shall be entitled to vote at said election if then qualified under the provisions of this Constitution.

Sec. 27. All elections by the people shall be by ballot; all elections by any representative body shall be *viva voce*, and the vote recorded in the journal thereof.

The ballot-box shall be kept in public view during all elections, and shall not be opened, nor the ballots canvassed or counted, in secret.

So far as consistent with the provisions of this Constitution, the absolute secrecy of the ballot shall be maintained.

Sec. 28. The General Assembly shall provide for ballots without any distinguishing mark or symbol, for use in all state, county, city, and other elections by the people, and the form thereof shall be the same in all places where any such election is held. All ballots shall contain the names of the candidates, and of the offices to be filled, in clear print and in due and orderly succession; but any voter may erase any name and insert another.

Sec. 29. No voter, during the time of holding any election at which he is entitled to vote, shall be compelled to perform military service, except in time of war or public danger; to attend any court as suitor, juror, or witness; and no voter shall be subject to arrest under any civil process during his attendance at election or in going to or returning therefrom.

Sec. 30. The General Assembly may prescribe a property qualification not exceeding two hundred and fifty dollars for voters in any county or subdivision thereof, or city or town, as a prerequisite for voting in any election for officers, other than the members of the General Assembly, to be wholly elected by the voters of such county or subdivision thereof, or city, or town; such action, if taken, to be had upon the initiative of a representative in the General Assembly of the county, city or town affected: provided, that the General Assembly in its discretion may make

such exemptions from the operation of said property qualification as shall not be in conflict with the Constitution of the United States.

Sec. 31. There shall be in each county and city an electoral board, composed of three members, appointed by the circuit court of the county or the corporation court of the city, or the judge of the court in vacation. Of those first appointed, one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years; and thereafter their successors shall be appointed for the full term of three years. Any vacancy occurring in any board shall be filled by the same authority for the unexpired term.

Each electoral board shall appoint the judges, clerks, and registrars of election for its county or city; and, in appointing judges of election, representation as far as possible shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and next highest number of votes.

No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States Government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board, or registrar, or judge of election.

Sec. 32. Every person qualified to vote shall be eligible to any office of the State, or of any county, city, town, or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise. Men and women eighteen years of age shall be eligible to the office of notary public, and qualified to execute the bonds required of them in that capacity.

Sec. 33. The terms of all officers elected under this Constitution shall begin on the first day of February next succeeding their election, unless otherwise provided in this Constitution. All officers, elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified.

Sec. 34. Members of the General Assembly and all officers, executive and judicial, elected or appointed after this Constitution goes into effect, shall, before they enter on the performance of their public duties, severally take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of Virginia ordained by the Convention which assembled in the city of Richmond on the twelfth day of June, nineteen hundred and one, and that I will faith-

fully and impartially discharge and perform all the duties incumbent on me as ————————, according to the best of my ability; so help me God."

Sec. 35. No person shall vote at any legalized primary election for the nomination of any candidate for office unless he is at the time registered and qualified to vote at the next succeeding election.

Sec. 36. The General Assembly shall enact such laws as are necessary and proper for the purpose of securing the regularity and purity of general, local and primary elections, and preventing and punishing any corrupt practices in connection therewith; and shall have power, in addition to other penalties and punishments now or hereafter prescribed by law for such offences, to provide that persons convicted of them shall thereafter be disqualified from voting or holding office.

Sec. 37. The General Assembly may provide for the use, throughout the State or in any one or more counties, cities, or towns in any election, of machines for receiving, recording, and counting the votes cast thereat: provided, that the secrecy of the voting be not thereby impaired.

Sec. 38. After the first day of January, nineteen hundred and four, the treasurer of each county and city shall, at least five months before each regular election, file with the clerk of the circuit court of his county, or of the corporation court of his city, a list of all persons in his county or city, who have paid not later than six months prior to such election, the state poll taxes required by this Constitution during the three years next preceding that in which such election is held; which list shall be arranged alphabetically, by magisterial districts or wards, shall state the white and colored persons separately, and shall be verified by the oath of the treasurer. The clerk, within ten days from the receipt of the list, shall make and certify a sufficient number of copies thereof, and shall deliver one copy for each voting place in his county or city, to the sheriff of the county or sergeant of the city, whose duty it shall be to post one copy, without delay, at each of the voting-places, and, within ten days from the receipt thereof, to make return on oath to the clerk, as to the places where and dates at which said copies were respectively posted; which return the clerk shall record in a book kept in his office for the purpose; and he shall keep in his office for public inspection, for at least sixty days after receiving the list, not less than ten certified copies thereof, and also cause the list to be published in such other manner as may be prescribed by law; the original list returned by the treasurer shall be filed and preserved by the clerk among the public records of his office for at least five years after receiving the same. Within thirty days after the list has been so posted, any person who shall have paid his capitation tax,

but whose name is omitted from the certified list, may, after five days' written notice to the treasurer, apply to the circuit court of his county, or corporation court of his city, or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly hear and decide.

The clerk shall deliver, or cause to be delivered, with the poll-books, at a reasonable time before every election, to one of the judges of election of each precinct of his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge, to the Auditor of Public Accounts, who shall charge the amount of the poll taxes stated therein to such treasurer unless previously accounted for.

Further evidence of the prepayment of the capitation taxes required by this Constitution, as a prerequisite to the right to register and vote, may be prescribed by law.

ARTICLE III.

DIVISION OF POWERS.

Sec. 39. Except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time.

ARTICLE IV.

LEGISLATIVE DEPARTMENT.

Sec. 40. The legislative power of the State shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates.

Sec. 41. The Senate shall consist of not more than forty and not less than thirty-three members, who shall be elected quadrennially by the voters of the several senatorial districts, on the Tuesday succeeding the first Monday in November.

Sec. 42. The House of Delegates shall consist of not more than one hundred and not less than ninety members, who shall be elected bi-enni-

17848
41

ally by the voters of the several house districts, on the Tuesday succeeding the first Monday in November.

Sec. 43. The apportionment of the State into senatorial and house districts, made by the acts of the General Assembly, approved April the second, nineteen hundred and two, is hereby adopted; but a re-apportionment may be made in the year nineteen hundred and six, and shall be made in the year nineteen hundred and twelve, and every tenth year thereafter.

Sec. 44. Any person may be elected senator who, at the time of election, is actually a resident of the senatorial district and qualified to vote for members of the General Assembly; and any person may be elected a member of the House of Delegates who, at the time of election, is actually a resident of the house district and qualified to vote for members of the General Assembly. But no person holding a salaried office under the state government, and no judge of any court, attorney for the Commonwealth, sheriff, sergeant, treasurer, assessor of taxes, commissioner of the revenue, collector of taxes, or clerk of any court, shall be a member of either house of the General Assembly during his continuance in office, and the election of any such person to either house of the General Assembly, and his qualification as a member thereof, shall vacate any such office held by him; and no person holding any office or post of profit or emolument under the United States Government or who is in the employment of such government, shall be eligible to either house. The removal of a senator or delegate from the district for which he is elected, shall vacate his office.

Sec. 45. The members of the General Assembly shall receive for their services a salary to be fixed by law and paid from the public treasury; but no act increasing such salary shall take effect until after the end of the term for which the members voting thereon were elected; and no member during the term for which he shall have been elected, shall be appointed or elected to any civil office of profit in the State except offices filled by election by the people.

Sec. 46. The General Assembly shall meet once in two years on the second Wednesday in January next succeeding the election of the members of the House of Delegates and not oftener unless convened in the manner prescribed by this Constitution. No session of the General Assembly, after the first under this Constitution, shall continue longer than sixty days; but with the concurrence of three-fifths of the members elected to each house, the session may be extended for a period not exceeding thirty days. Except for the first session held under this Constitution, members shall be allowed a salary for not exceeding sixty days at

any regular session, and for not exceeding thirty days at any extra session. Neither house shall, without the consent of the other, adjourn to another place nor for more than three days. A majority of the members elected to each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and shall have power to compel the attendance of members in such manner and under such penalty as each house may prescribe.

Sec. 47. The House of Delegates shall choose its own speaker; and, in the absence of the Lieutenant-Governor, or when he shall exercise the office of Governor, the Senate shall choose from their own body a president *pro tempore*. Each house shall select its officers, settle its rules of procedure, and direct writs of election for supplying vacancies which may occur during the session of the General Assembly; but, if vacancies occur during the recess, such writs may be issued by the Governor, under such regulations as may be prescribed by law. Each house shall judge of the election, qualification, and returns of its members; may punish them for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Sec. 48. Members of the General Assembly shall, in all cases, except treason, felony, or breach of the peace, be privileged from arrest during the sessions of their respective houses; and for any speech or debate in either house shall not be questioned in any other place. They shall not be subject to arrest, under any civil process, during the sessions of the General Assembly, or the fifteen days next before the beginning or after the ending of any session.

Sec. 49. Each house shall keep a journal of its proceedings, which shall be published from time to time, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Sec. 50. No law shall be enacted except by bill. A bill may originate in either house, to be approved or rejected by the other, or may be amended by either, with the concurrence of the other.

No bill shall become a law unless, prior to its passage, it has been,

(a) Referred to a committee of each house, considered by such committee in session, and reported;

(b) Printed by the house, in which it originated, prior to its passage therein;

(c) Read at length on three different calendar days in each house; and unless,

(d) A yea and nay vote has been taken in each house upon its final passage, the names of the members voting for and against entered on the

journal, and a majority of those voting, which shall include at least two-fifths of the members elected to each house, recorded in the affirmative.

And only in the manner required in subdivision (d) of this section shall an amendment to a bill by one house be concurred in by the other, or a conference report be adopted by either house, or either house discharge a commitee from the consideration of a bill and consider the same as if reported; provided that the printing and reading, or either, required in subdivisions (b) and (c) of this section, may be dispensed with in a bill to codify the laws of the State, and in any case of emergency by a vote of four-fifths of the members voting in each house taken by the yeas and nays, the names of the members voting for and against, entered on the journal; and provided further, that no bill which creates, or establishes a new office, or which creates, continues, or revives a debt or charge, or makes, continues or revives any appropriation of public or trust money, or property, or releases, discharges or commutes any claim or demand of the State, or which imposes, continues or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the vote to be by the yeas and nays, and the names of the members voting for and against, entered on the journal. Every law imposing, continuing or reviving a tax shall specifically state such tax and no law shall be construed as so stating such tax, which requires a reference to any other law or any other tax. The presiding officer of each house shall, in the presence of the house over which he presides, sign every bill that has been passed by both houses and duly enrolled. Immediately before this is done, all other business being suspended, the title of the bill shall be publicly read. The fact of signing shall be entered on the journal.

Sec. 51. There shall be a joint committee of the General Assembly, consisting of seven members appointed by the House of Delegates, and five members appointed by the Senate, which shall be a standing committee on special, private, and local legislation. Before reference to a committee, as provided by section Fifty, any special, private, or local bill introduced in either house shall be referred to and considered by such joint committee and returned to the house in which it originated with a statement in writing whether the object of the bill can be accomplished under general law or by court proceeding; whereupon, the bill, with the accompanying statement, shall take the course provided by section Fifty. The joint committee may be discharged from the consideration of a bill by the house in which it originated in the manner provided in section Fifty for the discharge of other committees.

Sec. 52. No law shall embrace more than one object, which shall be ex-

pressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length.

Sec. 53. No law, except a general appropriation law, shall take effect until at least ninety days after the adjournment of the session of the General Assembly at which it is enacted, unless in case of an emergency (which emergency shall be expressed in the body of the bill), the General Assembly shall otherwise direct by a vote of four-fifths of the members voting in each house, such vote to be taken by the yeas and nays, and the names of the members voting for and against entered on the journal.

Sec. 54. The Governor, Lieutenant-Governor, Attorney-General, judges, members of the State Corporation Commission, and executive officers at the seat of government, and all officers appointed by the Governor or elected by the General Assembly, offending against the State by malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor, may be impeached by the House of Delegates, and prosecuted before the Senate which shall have the sole power to try impeachment. When sitting for that purpose, the senators shall be on oath or affirmation, and no person shall be convicted without the concurrence of two-thirds of the senators present. Judgment in case of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the State; but the person convicted shall nevertheless be subject to indictment, trial, judgment, and punishment according to law. The Senate may sit during the recess of the General Assembly for the trial of impeachments.

Sec. 55. The General Assembly shall by law apportion the State into districts, corresponding with the number of representatives to which it may be entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants.

Sec. 56. The manner of conducting and making returns of elections, of determining contested elections, and of filling vacancies in office, in cases not specially provided for by this Constitution, shall be prescribed by law, and the General Assembly may declare the cases in which any office shall be deemed vacant where no provision is made for that purpose in this Constitution.

Sec. 57. The General Assembly shall have power, by a two-thirds vote, to remove disabilities incurred under section Twenty-three, of Article Two, of this Constitution, with reference to duelling.

Sec. 58. The privilege of the writ of *habeas corpus* shall not be sus-

17850
45

pended unless when in cases of invasion or rebellion, the public safety may require. The General Assembly shall not pass any bill of attainder, or any *ex post facto* law, or any law impairing the obligation of contracts, or any law abridging the freedom of speech or of the press. It shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and the same shall in no wise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves or others any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.

Sec. 59. The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law.

Sec. 60. No lottery shall hereafter be authorized by law; and the buying, selling, or transferring of tickets or chances in any lottery shall be prohibited.

Sec. 61. No new county shall be formed with an area of less than six hundred square miles; nor shall the county or counties from which it is formed be reduced below that area; nor shall any county be reduced in population below eight thousand. But any county, the length of which is three times its mean breadth, or which exceeds fifty miles in length, may be divided at the discretion of the General Assembly.

Sec. 62. The General Assembly shall have full power to enact local option or dispensary laws, or any other laws controlling, regulating, or prohibiting the manufacture or sale of intoxicating liquors.

Sec. 63. The General Assembly shall confer on the courts power to grant divorces, change the names of persons, and direct the sale of estates belonging to infants and other persons under legal disabilities, and shall not, by special legislation, grant relief in these or other cases of which the courts or other tribunals may have jurisdiction. The General Assembly may regulate the exercise by courts of the right to punish for con-

tempt. The General Assembly shall not enact any local, special, or private law in the following cases:

1. For the punishment of crime.

2. Providing a change of venue in civil or criminal cases.

3. Regulating the practice in, or the jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before, the courts or other tribunals, or providing or changing the methods of collecting debts or enforcing judgments, or prescribing the effect of judicial sales of real estate.

4. Changing or locating county seats.

5. For the assessment and collection of taxes, except as to animals which the General Assembly may deem dangerous to the farming interests.

6. Extending the time for the assessment or collection of taxes.

7. Exempting property from taxation.

8. Remitting, releasing, postponing, or diminishing any obligation or liability of any person, corporation, or association, to the State or to any political subdivision thereof.

9. Refunding money lawfully paid into the treasury of the State or the treasury of any political subdivision thereof.

10. Granting from the treasury of the State, or granting or authorizing to be granted from the treasury of any political subdivision thereof, any extra compensation to any public officer, servant, agent, or contractor.

11. For conducting elections or designating the places of voting.

12. Regulating labor, trade, mining or manufacturing, or the rate of interest on money.

13. Granting any pension or pensions.

14. Creating, increasing, or decreasing, or authorizing to be created, increased, or decreased, the salaries, fees, percentages, or allowances of public officers during the term for which they are elected or appointed.

15. Declaring streams navigable, or authorizing the construction of booms or dams therein, or the removal of obstructions therefrom.

16. Affecting or regulating fencing or the boundaries of land, or the running at large of stock.

17. Creating private corporations, or amending, renewing, or extending the charters thereof.

18. Granting to any private corporation, association, or individual any special or exclusive right, privilege or immunity.

19. Naming or changing the name of any private corporation or association.

20. Remitting the forfeiture of the charter of any private corporation

17851
47

except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution and the laws passed in pursuance thereof.

Sec. 64. In all the cases enumerated in the last section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws. Any general law shall be subject to amendment or repeal, but the amendment or partial repeal thereof shall not operate directly or indirectly to enact, and shall not have the effect of the enactment of a special, private, or local law.

No general or special law shall surrender or suspend the right and power of the State, or any political subdivision thereof, to tax corporations and corporate property, except as authorized by Article Thirteen. No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall its operation be suspended for the benefit of any private corporation, association, or individual.

Sec. 65. The General Assembly may, by general laws, confer upon the boards of supervisors of counties, and the councils of cities and towns, such powers of local and special legislation, as it may from time to time deem expedient, not inconsistent with the limitations contained in this Constitution.

Sec. 66. The Clerk of the House of Delegates shall be Keeper of the Rolls of the State but shall receive no compensation from the State for his services as such.

The General Assembly by general law shall prescribe the number of employees of the Senate and House of Delegates, including the clerks thereof, and fix their compensation at a *per diem* for the time actually employed in the discharge of their duties.

Sec. 67. The General Assembly shall not make any appropriation of public funds, of personal property, or of any real estate, to any church, or sectarian society, association, or institution of any kind whatever, which is entirely or partly, directly or indirectly, controlled by any church or sectarian society; nor shall the General Assembly make any like appropriation to any charitable institution, which is not owned or controlled by the State; except that it may, in its discretion, make appropriations to non-sectarian institutions for the reform of youthful criminals; but nothing herein contained shall prohibit the General Assembly from authorizing counties, cities, or towns to make such appropriations to any charitable institution or association.

Sec. 68. The General Assembly shall, at each regular session, appoint a standing committee, consisting of two members of the Senate and three

members of the House of Delegates, which shall be known as the Auditing Committee. Such committee shall annually, or oftener in its discretion, examine the books and accounts of the First Auditor, the State Treasurer, the Secretary of the Commonwealth, and other executive officers at the seat of government whose duties pertain to auditing or accounting for the state revenue, report the result of its investigations to the Governor, and cause the same to be published in two newspapers of general circulation in the State. The Governor shall, at the beginning of each session, submit said reports to the General Assembly for appropriate action. The committee may sit during the recess of the General Assembly, receive such compensation as may be prescribed by law, and employ one or more accountants to assist in its investigations.

ARTICLE V.

EXECUTIVE DEPARTMENT.

Sec. 69. The chief executive power of the State shall be vested in a Governor. He shall hold office for a term of four years, to commence on the first day of February next succeeding his election, and be ineligible to the same office for the term next succeeding that for which he was elected, and to any other office during his term of service.

Sec. 70. The Governor shall be elected by the qualified voters of the State at the time and place of choosing members of the General Assembly. Returns of the election shall be transmitted, under seal, by the proper officers, to the Secretary of the Commonwealth, who shall deliver them to the Speaker of the House of Delegates on the first day of the next session of the General Assembly. The Speaker of the House of Delegates shall, within one week thereafter, in the presence of a majority of the Senate and of the House of Delegates, open the returns, and the votes shall then be counted. The person having the highest number of votes shall be declared elected; but if two or more shall have the highest and an equal number of votes, one of them shall be chosen Governor by the joint vote of the two houses of the General Assembly. Contested elections for Governor shall be decided by a like vote, and the mode of proceeding in such cases shall be prescribed by law.

Sec. 71. No person except a citizen of the United States shall be eligible to the office of Governor; and if such person be of foreign birth, he must have been a citizen of the United States for ten years next preceding his election; nor shall any person be eligible to that office unless he shall

17852
49

have attained the age of thirty years, and have been a resident of the State for five years next preceding his election.

Sec. 72. The Governor shall reside at the seat of government; shall receive five thousand dollars for each year of his service, and while in office shall receive no other emolument from this or any other government.

Sec. 73. The Governor shall take care that the laws be faithfully executed; communicate to the General Assembly, at every session, the condition of the State; recommend to its consideration such measures as he may deem expedient, and convene the General Assembly on application of two-thirds of the members of both houses thereof, or when, in his opinion, the interest of the State may require. He shall be commander-in-chief of the land and naval forces of the State; have power to embody the militia to repel invasion, suppress insurrection and enforce the execution of the laws; conduct, either in person or in such manner as shall be prescribed by law, all intercourse with other and foreign states; and, during the recess of the General Assembly, shall have power to suspend from office for misbehavior, incapacity, neglect of official duty, or acts performed without due authority of law, all executive officers at the seat of government except the Lieutenant-Governor; but, in any case in which this power is so exercised, the Governor shall report to the General Assembly, at the beginning of the next session thereof, the fact of such suspension and the cause therefor, whereupon the General Assembly shall determine whether such officer shall be restored or finally removed; and the Governor shall have power, during the recess of the General Assembly, to appoint, *pro tempore*, successors to all officers so suspended, and to fill, *pro tempore*, vacancies in all offices of the State for the filling of which the Constitution and laws make no other provision; but his appointments to such vacancies shall be by commissions to expire at the end of thirty days after the commencement of the next session of the General Assembly. He shall have power to remit fines and penalties in such cases, and under such rules and regulations, as may be prescribed by law, and except when the prosecution has been carried on by the House of Delegates, to grant reprieves and pardons after conviction; to remove political disabilities consequent upon conviction for offences committed prior or subsequent to the adoption of this Constitution, and to commute capital punishment; but he shall communicate to the General Assembly, at each session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same.

Sec. 74. The Governor may require information in writing, under

oath, from the officers of the executive department and superintendents of state institutions upon any subject relating to the duties of their respective offices and institutions; and he may inspect at any time their official books, accounts and vouchers, and ascertain the condition of the public funds in their charge, and in that connection may employ accountants. He may require the opinion in writing of the Attorney-General upon any question of law affecting the official duties of the Governor.

Sec. 75. Commissions and grants shall run in the name of Commonwealth of Virginia, and be attested by the Governor, with the seal of the Commonwealth annexed.

Sec. 76. Every bill, which shall have passed the Senate and House of Delegates, shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it; but, if not, he may return it with his objections to the house in which it originated, which shall enter the objections at large on its journal and proceed to reconsider the same. If, after such consideration, two-thirds of the members present, which two-thirds shall include a majority of the members elected to that house, shall agree to pass the bill it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of all the members present, which two-thirds shall include a majority of the members elected to that house, it shall become a law, notwithstanding the objections. The Governor shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object. The item or items objected to shall not take effect except in the manner heretofore provided in this section as to bills returned to the General Assembly without his approval. If he approve the general purpose of any bill, but disapprove any part or parts thereof, he may return it, with recommendations for its amendment, to the house in which it originated, whereupon the same proceedings shall be had in both houses upon the bill and his recommendations in relation to its amendment, as is above provided in relation to a bill which he shall have returned without his approval, and with his objections thereto: provided, that if after such reconsideration, both houses, by a vote of a majority of the members present in each, shall agree to amend the bill in accordance with his recommendations in relation thereto, or either house by such vote shall fail or refuse to so amend it, then, and in either case the bill shall be again sent to him, and he may act upon it as if it were then before him for the first time. But in all the cases above set forth the votes of both houses shall be determined by ayes and noes, and the names of the members voting for and against the bill, or item or items of an appropriation bill, shall be entered on the journal

17853
51

of each house. If any bill shall not be returned by the Governor within five days (Sunday excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly shall, by final adjournment, prevent such return; in which case it shall be a law if approved by the Governor in the manner and to the extent above provided, within ten days after such adjournment, but not otherwise.

Sec. 77. A Lieutenant-Governor shall be elected at the same time and for the same term as the Governor, and his qualifications and the manner and ascertainment of his election, in all respects, shall be the same.

Sec. 78. In case of the removal of the Governor from office, or of his death, failure to qualify, resignation, removal from the State, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the Lieutenant-Governor; and the General Assembly shall provide by law for the discharge of the executive functions in other necessary cases.

Sec. 79. The Lieutenant-Governor shall be president of the Senate, but shall have no vote except in case of an equal division; and while acting as such, shall receive a compensation equal to that allowed to the Speaker of the House of Delegates.

Sec. 80. A Secretary of the Commonwealth shall be elected by the qualified voters of the State at the same time and for the same term as the Governor; and the fact of his election shall be ascertained as in the case of the Governor. He shall keep a daily record of the official acts of the Governor, which shall be signed by the Governor and attested by the Secretary, and, when required, he shall lay the same, and any papers, minutes and vouchers pertaining to his office, before either house of the General Assembly. He shall discharge such other duties as may be prescribed by law. All fees received by the Secretary of the Commonwealth shall be paid into the treasury monthly.

Sec. 81. A State Treasurer shall be elected by the qualified voters of the State at the same time and for the same term as the Governor; and the fact of his election shall be ascertained in the same manner. His powers and duties shall be prescribed by law.

Sec. 82. An Auditor of Public Accounts shall be elected by the joint vote of the two houses of the General Assembly for the term of four years. His powers and duties shall be prescribed by law.

Sec. 83. The salary of each officer of the Executive Department, except in those cases where the salary is determined by this Constitution, shall be fixed by law; and the salary of no such officer shall be increased or diminished during the term for which he shall have been elected or appointed.

Sec. 84. The General Assembly shall provide by law for the establishment and maintenance of an efficient system of checks and balances between the officers at the seat of government entrusted with the collection, receipt, custody, or disbursement of the revenues of the State.

Sec. 85. All State officers, and their deputies, assistants or employees, charged with the collection, custody, handling or disbursement of public funds, shall be required to give bond for the faithful performance of such duties; the amount of such bond in each case, and the manner in which security shall be furnished, to be specified and regulated by law.

Sec. 86. The General Assembly shall have power to establish and maintain a Bureau of Labor and Statistics, under such regulations as may be prescribed by law.

ARTICLE VI.

JUDICIARY DEPARTMENT.

Sec. 87. The Judiciary Department shall consist of a Supreme Court of Appeals, circuit courts, city courts, and such other courts as are hereinafter authorized. The jurisdiction of these tribunals and the judges thereof, except so far as conferred by this Constitution, shall be regulated by law.

Sec. 88. The Supreme Court of Appeals shall consist of five judges, any three of whom may hold a court. It shall have original jurisdiction in cases of *habeas corpus, mandamus,* and prohibition; but in all other cases, in which it shall have jurisdiction, it shall have appellate jurisdiction only.

Subject to such reasonable rules, as may be prescribed by law, as to the course of appeal, the limitation as to time, the security required, if any, the granting or refusing of appeals, and the procedure therein, it shall, by virtue of this Constitution, have appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the Constitution of this State or of the United States, or involving the life or liberty of any person; and it shall also have appellate jurisdiction in such other cases, within the limits hereinafter defined, as may be prescribed by law; but no appeal shall be allowed to the Commonwealth in any case involving the life or liberty of a person, except that an appeal by the Commonwealth may be allowed by law in any case involving the violation of a law relating to the state revenue. No bond shall be required of any accused person as a condition of appeal, but a *supersedeas* bond may be required where the only punishment imposed in the court below is a fine.

The court shall not have jurisdiction in civil cases where the matter in

17854
53

controversy, exclusive of costs and of interest accrued since the judgment in the court below, is less in value or amount than three hundred dollars, except in controversies concerning the title to, or boundaries of land, the condemnation of property, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, or landing, or the right of the State, county, or municipal corporation, to levy tolls or taxes, or involving the construction of any statute, ordinance or county proceeding imposing taxes; and, except in cases of *habeas corpus, mandamus,* and prohibition, the constitutionality of a law, or some other matter not merely pecuniary. After the year nineteen hundred and ten the General Assembly may change the jurisdiction of the court in matters merely pecuniary. The assent of at least three of the judges shall be required for the court to determine that any law is, or is not, repugnant to the Constitution of this State or of the United States; and if, in a case involving the constitutionality of any such law, not more than two of the judges sitting agree in opinion on the constitutional question involved, and the case cannot be determined, without passing on such question, no decision shall be rendered therein, but the case shall be reheard by a full court; and in no case where the jurisdiction of the court depends solely upon the fact that the constitutionality of a law is involved, shall the court decide the case upon its merits, unless the contention of the appellant upon the constitutional question be sustained. Whenever the requisite majority of the judges sitting are unable to agree upon a decision, the case shall be reheard by a full bench, and any vacancy caused by any one or more of the judges being unable, unwilling, or disqualified to sit, shall be temporarily filled in a manner to be prescribed by law.

Sec. 89. The General Assembly may, from time to time, provide for a Special Court of Appeals to try any cases on the docket of the Supreme Court of Appeals in respect to which a majority of the judges are so situated as to make it improper for them to sit; and also to try any cases on said docket which cannot be disposed of with convenient dispatch. The said special court shall be composed of not less than three nor more than five of the judges of the circuit courts and city courts of record in cities of the first class, or of the judges of either of said courts, or of any of the judges of said courts together with one or more of the judges of the Supreme Court of Appeals.

Sec. 90. When a judgment or decree is reversed or affirmed by the Supreme Court of Appeals the reasons therefor shall be stated in writing and preserved with the record of the case.

Sec. 91. The judges of the Supreme Court of Appeals shall be chosen

by the joint vote of the two houses of the General Assembly. They shall, when chosen, have held a judicial station in the United States, or shall have practiced law in this or some other state for five years. At the first election under this Constitution, the General Assembly shall elect the judges for terms of four, six, eight, ten, and twelve years respectively; and thereafter they shall be elected for terms of twelve years.

Sec. 92. The officers of the Supreme Court of Appeals shall be appointed by the court or by the judges in vacation. Their duties, compensation, and tenure of office shall be prescribed by law.

Sec. 93. The Supreme Court of Appeals shall hold its sessions at two or more places in the State, to be fixed by law.

Sec. 94. The State shall be divided into twenty-four judicial circuits, as follows:

The counties of Norfolk, Princess Anne, and the city of Portsmouth, shall constitute the first circuit.

The counties of Nansemond, Southampton, Isle of Wight, and the city of Norfolk, shall constitute the second circuit.

The counties of Prince George, Surry, Sussex, Greenesville, and Brunswick, shall constitute the third circuit.

The counties of Chesterfield, Powhatan, Dinwiddie, Nottoway, and Amelia, and the city of Petersburg, shall constitute the fourth circuit.

The counties of Prince Edward, Cumberland, Buckingham, Appomattox, and Charlotte, shall constitute the fifth circuit.

The counties of Lunenburg, Mecklenburg, Halifax, Campbell, and the city of Lynchburg, shall constitute the sixth circuit.

The counties of Pittsylvania, Franklin, Henry, and Patrick, and the city of Danville, shall constitute the seventh circuit.

The counties of Amherst, Nelson, Albemarle, Fluvanna, and Goochland, shall constitute the eighth circuit.

The counties of Rappahannock, Culpeper, Madison, Greene, Orange, and Louisa, shall constitute the ninth circuit.

The county of Henrico and the city of Richmond, shall constitute the tenth circuit.

The counties of Accomac, Northampton, Elizabeth City, and the city of Newport News, shall constitute the eleventh circuit.

The counties of Richmond, Northumberland, Westmoreland, Lancaster, and Essex, shall constitute the twelfth circuit.

The counties of Gloucester, Mathews, King and Queen, King William, and Middlesex, shall constitute the thirteenth circuit.

The counties of New Kent, Charles City, York, Warwick, James City, and the city of Williamsburg, shall constitute the fourteenth circuit.

17855

The counties of King George, Stafford, Spotsylvania, Caroline, and Hanover, shall constitute the fifteenth circuit.

The counties of Fauquier, Loudoun, Prince William, Fairfax, and Alexandria, and the city of Alexandria, shall constitute the sixteenth circuit.

The counties of Frederick, Clarke, Warren, Shenandoah, and Page, shall constitute the seventeenth circuit.

The counties of Rockingham, Augusta, and Rockbridge, shall constitute the eighteenth circuit.

The counties of Highland, Bath, Alleghany, Craig, and Botetourt, shall constitute the nineteenth circuit.

The counties of Bedford, Roanoke, Montgomery, and Floyd, and the city of Roanoke, shall constitute the twentieth circuit.

The counties of Pulaski, Carroll, Wythe, and Grayson, shall constitute the twenty-first circuit.

The counties of Bland, Tazewell, Giles, and Buchanan, shall constitute the twenty-second circuit.

The counties of Washington, Russell, and Smyth, shall constitute the twenty-third circuit.

The counties of Scott, Lee, Wise, and Dickenson, shall constitute the twenty-fourth circuit.

Sec. 95. After the first day of January, nineteen hundred and six, as the public interest requires, the General Assembly may rearrange the said circuits and increase or diminish the number thereof. But no new circuit shall be created containing, by the last United States census or other census provided by law, less than forty thousand inhabitants, nor when the effect of creating it will be to reduce the number of inhabitants in any existing circuit below forty thousand according to such census.

Sec. 96. For each circuit a judge shall be chosen by the joint vote of the two houses of the General Assembly. He shall, when chosen, possess the same qualifications as judges of the Supreme Court of Appeals, and during his continuance in office shall reside in the circuit of which he is judge. At the first election under this Constitution, the General Assembly shall elect, as nearly as practicable, one-fourth of the entire number of judges for terms of two years, one-fourth for four years, one-fourth for six years, and the remaining fourth for eight years, respectively; and thereafter they shall be elected for terms of eight years.

Sec. 97. The number of terms of the circuit courts to be held for each county and city, shall be prescribed by law. But no separate circuit court shall be held for any city of the second class, until the city shall abolish

its existing city court. The judge of one circuit may be required or authorized to hold court in any other circuit or city.

Sec. 98. For the purposes of a judicial system, the cities of the State shall be divided into two classes. All cities shall belong to the first class which contain, as shown by the last United States census or other census provided by law, ten thousand inhabitants or more, and all cities shall belong to the second class which contain, as thus shown, less than ten thousand inhabitants. In each city of the first class, there shall be, in addition to the circuit court, a corporation court. In any city containing thirty thousand inhabitants or more, the General Assembly may provide for such additional courts as the public interest may require, and in every such city the city courts, as they now exist, shall continue until otherwise provided by law. In every city of the second class, the corporation or hustings court existing, at the time this Constitution goes into effect, shall continue hereafter under the name of the corporation court of such city; but it may be abolished by a vote of a majority of the qualified electors of such city, at an election held for the purpose, and whenever the office of judge of a corporation or hustings court of a city of the second class, whose salary is less than eight hundred dollars, shall become and remain vacant for ninety days consecutively, such court shall thereby cease to exist. In case of the abolition of the corporation or hustings court of any city of the second class, such city shall thereupon come in every respect within the jurisdiction of the circuit court of the county wherein it is situated, until otherwise provided by law, and the records of such corporation or hustings court shall thereupon become a part of the records of such circuit court, and be transferred thereto, and remain therein until otherwise provided by law; and during the existence of the corporation or hustings court, the circuit court of the county in which such city is situated, shall have concurrent jurisdiction with said corporation or hustings court in all actions at law and suits in equity.

Sec. 99. For each city court of record a judge shall be chosen by the joint vote of the two houses of the General Assembly. He shall, when chosen, possess the same qualifications as judges of the Supreme Court of Appeals, and during his continuance in office shall reside within the jurisdiction of the court over which he presides; but the judge of the corporation court of any corporation having a city charter, and less than five thousand inhabitants, may reside outside its corporate limits; and the same person may be judge of such corporation court and judge of the corporation court of some other city having less than ten thousand inhabitants. At the first election of said judges under this Constitution, the General Assembly shall elect, as nearly as practicable, one-fourth of the

17856
57

entire number for terms of two years, one-fourth for four years, one-fourth for six years, and the remaining fourth for eight years; and thereafter they shall be elected for terms of eight years. The judges of city courts in cities of the first class may be required or authorized to hold the circuit courts of any county and the circuit courts of any city.

Sec. 100. The General Assembly shall have power to establish such court or courts of land registration as it may deem proper for the administration of any law it may adopt for the purpose of the settlement, registration, transfer, or assurance of titles to land in the State, or any part thereof.

Sec. 101. The General Assembly shall have power to confer upon the clerks of the several circuit courts jurisdiction, to be exercised in the manner and under the regulations to be prescribed by law, in the matter of the admission of wills to probate, and of the appointment and qualification of guardians, personal representatives, curators, appraisers, and committees of the estates of persons who have been adjudged insane or convicted of felony, and in the matter of the substitution of trustees.

Sec. 102. All the judges shall be commissioned by the Governor. They shall receive such salaries and allowances as may be determined by law within the limitations fixed by this Constitution, the amount of which shall not be increased or diminished during their terms of office. Their terms of office shall commence on the first day of February next following their election, and whenever a vacancy occurs in the office of judge, his successor shall be elected for the unexpired term.

Sec. 103. The salaries of the judges of the Supreme Court of Appeals shall be not less than four thousand dollars per annum, and shall be paid by the State.

The salary of the judge of each circuit court shall be not less than two thousand dollars per annum, one-half of which shall be paid by the State, the other half by the counties and cities composing the circuit, according to their respective population; except that of the salary of the judge of the circuit court of the city of Richmond, the State shall pay the proportion which would otherwise fall to the city of Richmond. The salary of a judge of a city court in a city of the first class shall be not less than two thousand dollars per annum, one-half of which shall be paid by the State, the other half by the city. The whole of the aforesaid salaries of said judges shall be paid out of the state treasury, the State to be reimbursed by the respective counties and cities. Any city may, by an ordinance, increase the salaries of its city or circuit judges, or any one or more of them as it may deem proper, and the increase shall be paid wholly by the city, but shall not be enlarged or diminished during the term of office of the

judge. Each city containing less than ten thousand inhabitants shall pay the salary of the judge of its corporation or hustings court.

Sec. 104. Judges may be removed from office for cause, by a concurrent vote of both houses of the General Assembly; but a majority of all the members elected to each house must concur in such vote, and the cause of removal shall be entered on the journal of each house. The judge against whom the General Assembly may be about to proceed shall have notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon.

Sec. 105. No judge of the Supreme Court of Appeals, of the circuit court, or of any city court of record shall practice law, within or without this State, nor shall he hold any other office of public trust during his continuance in office; except that the judge of a corporation or hustings court in a city of the second class, may hold the office of commissioner in chancery of the circuit court for the county in which the city is located.

Sec. 106. Writs shall run in the name of the "Commonwealth of Virginia," and be attested by the clerks of the several courts. Indictments shall conclude "against the peace and dignity of the Commonwealth."

Sec. 107. An Attorney-General shall be elected by the qualified voters of the State at the same time and for the same term as the Governor; and the fact of his election shall be ascertained in the same manner. He shall be commissioned by the Governor, perform such duties and receive such compensation as may be prescribed by law, and shall be removable in the manner prescribed for the removal of judges.

Sec. 108. The General Assembly shall provide for the appointment or election and for the jurisdiction of such justices of the peace as the public interest may require.

Sec. 109. The General Assembly shall provide by whom, and in what manner, applications for bail shall be heard and determined.

ARTICLE VII.

ORGANIZATION AND GOVERNMENT OF COUNTIES.

Sec. 110. There shall be elected by the qualified voters of each county, one county treasurer, who shall not be elected or serve for more than two consecutive terms, nor act as deputy of his immediate successor; one sheriff, one attorney for the Commonwealth, and one county clerk, who shall be the clerk of the circuit court. There shall be elected or appointed, for four years, as the General Assembly may provide, commis-

17857

sioners of the revenue, for each county, the number, duties and compensation of whom shall be prescribed by law; but should such commissioners of the revenue be chosen by election by the people then they shall be ineligible for re-election to the office for the next succeeding term.

There shall be appointed, for each county, in such manner as may be provided by law, one superintendent of the poor, and one county surveyor.

Sec. 111. The magisterial districts shall, until changed by law, remain as now constituted: provided, that hereafter no additional districts shall be made containing less than thirty square miles. In each district there shall be elected by the qualified voters thereof, one supervisor. The supervisors of the districts shall constitute the board of supervisors of the county, which shall meet at stated periods and at other times as often as may be necessary, lay the county and district levies, pass upon all claims against the county, subject to such appeal as may be provided by law, and perform such duties as may be required by law.

Sec. 112. All regular elections for county and district officers shall be held on Tuesday after the first Monday in November, and all of said officers shall enter upon the duties of their offices on the first day of January next succeeding their election, and shall hold their respective offices for the term of four years, except that the county clerk shall hold office for eight years; provided that the term of the clerks first elected under this Constitution shall begin on the first of February, nineteen hundred and four, and end on the first of January, nineteen hundred and twelve.

Sec. 113. No person shall at the same time hold more than one of the offices mentioned in this article. Any officer required by law to give bond may be required to give additional security thereon, or to execute a new bond, and in default of so doing his office shall be declared vacant.

Sec. 114. Counties shall not be made responsible for the acts of the sheriffs.

Sec. 115. The General Assembly shall provide for the examination of the books, accounts and settlements of county and city officers who are charged with the collection and disbursement of public funds.

ARTICLE VIII.

ORGANIZATION AND GOVERNMENT OF CITIES AND TOWNS.

Sec. 116. As used in this article the words "incorporated communities" shall be construed to relate only to cities and towns. All incorporated communities, having within defined boundaries a population of five thousand or more, shall be known as cities; and all incorporated commu-

nities, having within defined boundaries a population of less than five thousand, shall be known as towns. In determining the population of such cities and towns the General Assembly shall be governed by the last United States census, or such other enumeration as may be made by authority of the General Assembly; but nothing in this section shall be construed to repeal the charter of any incorporated community of less than five thousand inhabitants having a city charter at the time of the adoption of this Constitution, or to prevent the abolition by such incorporated communities of the corporation or hustings court thereof.

Sec. 117. General laws for the organization and government of cities and towns shall be enacted by the General Assembly, and no special act shall be passed in relation thereto, except in the manner provided in Article Four of this Constitution, and then only by a recorded vote of two-thirds of the members elected to each house. But each of the cities and towns of the State having at the time of the adoption of this Constitution a municipal charter may retain the same, except so far as it shall be repealed or amended by the General Assembly: provided, that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers set forth in this article, or otherwise provided in this Constitution.

Sec. 118. In each city which has a court in whose office deeds are admitted to record, there shall be elected for a term of eight years by the qualified voters of such city a clerk of said court, who shall perform such other duties as may be required by law.

There shall be elected in like manner and for a like term all such additional clerks of courts for cities as the General Assembly may prescribe, or as are now authorized by law, so long as such courts shall continue in existence. But in no city of less than thirty thousand inhabitants shall there be more than one clerk of the court, who shall be clerk of all the courts of record in such city.

Sec. 119. In every city, so long as it has a corporation court, or a separate circuit court, there shall be elected for a term of four years by the qualified voters of such city, one attorney for the Commonwealth, who shall also, in those cities having a separate circuit court, be the attorney for the Commonwealth, for such circuit court.

In every city there shall be elected, or appointed, for a term of four years, in a manner to be provided by law, one commissioner of revenue, whose duties and compensation shall be prescribed by law; but should he be elected by the people, he shall be ineligible for re-election to the office for the next succeeding term.

Sec. 120. In every city there shall be elected by the qualified voters

17858

thereof one city treasurer, for a term of four years, but he shall not be eligible for more than two consecutive terms, nor act as deputy for his immediate successor; one city sergeant, for a term of four years, whose duties shall be prescribed by law; and, a mayor, for a term of four years, who shall be the chief executive officer of such city. All city and town officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities and towns, or of some division thereof, or appointed by such authorities thereof as the General Assembly shall designate.

The mayor shall see that the duties of the various city officers, members of the police and fire departments, whether elected or appointed, in and for such city, are faithfully performed. He shall have power to investigate their acts, have access to all books and documents in their offices, and may examine them and their subordinates on oath. The evidence given by persons so examined shall not be used against them in any criminal proceedings. He shall also have power to suspend such officers and the members of the police and fire departments, and to remove such officers, and also such members of said departments when authorized by the General Assembly, for misconduct in office or neglect of duty, to be specified in the order of suspension or removal; but no such removal shall be made without reasonable nôtice to the officer complained of, and an opportunity afforded him to be heard in person, or by counsel, and to present testimony in his defense. From such order of suspension or removal, the city officer so suspended or removed shall have an appeal of right to the corporation court, or, if there be no such court, to the circuit court of such city, in which court the case shall be heard *de novo* by the judge thereof, whose decision shall be final. He shall have all other powers and duties which may be conferred and imposed upon him by general laws.

Sec. 121. There shall be in every city a council, composed of two branches having a different number of members, whose powers and terms of office shall be prescribed by law, and whose members shall be elected by the qualified voters of such city, in the manner prescribed by law, but so as to give as far as practicable, to each ward of such city, equal representation in each branch of said council in proportion to the population of such ward; but in cities of under ten thousand population the General Assembly may permit the council to consist of one branch. No member of the council shall be eligible during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council by election or appointment. The council of every city may, in a manner prescribed by law, increase or diminish the number, and change the boun-

daries, of the wards thereof, and shall, in the year nineteen hundred and three, and in every tenth year thereafter, and also whenever the boundaries of such wards are changed, re-apportion the representation in the council among the wards in a manner prescribed by law; and whenever the council of any such city shall fail to perform the duty so prescribed, a *mandamus* shall lie on behalf of any citizen thereof to compel its performance.

Sec. 122. The mayors and councils of cities shall be elected on the second Tuesday in June, and their terms of office shall begin on the first day of September succeeding. All other elective officers, provided for by this article, or hereafter authorized by law, shall be elected on the Tuesday after the first Monday in November, and their terms of office shall begin on the first day of January succeeding, except that the terms of office of clerks of the city courts shall begin coincidently with that of the judges of said courts: provided, that the General Assembly may change the time of election of all or any of the said officers, except that the election and the beginning of the terms of mayors and councils of cities shall not be made by the General Assembly to occur at the same time with the election and beginning of the terms of office of the other elective officers provided for by this Constitution.

Sec. 123. Every ordinance, or resolution having the effect of an ordinance, shall, before it becomes operative, be presented to the mayor. If he approve he shall sign it, but if not, if the council consist of two branches, he may return it, with his objections in writing, to the clerk, or other recording officer, of that branch in which it originated; which branch shall enter the objections at length on its journal and proceed to reconsider it. If after such consideration two-thirds of all the members elected thereto shall agree to pass the ordinance or resolution it shall be sent, together with the objections, to the other branch, by which it shall likewise be considered, and if approved by two-thirds of all the members elected thereto, it shall become operative notwithstanding the objections of the mayor. But in all such cases the votes of both branches of the council shall be determined by yeas and nays, and the names of the members voting for and against the ordinance or resolution shall be entered on the journal of each branch. If the council consist of a single branch, the mayor's objections in writing to any ordinance, or resolution having the effect of an ordinance, shall be returned to the clerk, or other recording officer of the council, and be entered at length on its journal; whereupon the council shall proceed to reconsider the same. Upon such consideration the vote shall be taken in the same manner as where the council consists of two branches, and if the ordinance or resolution be approved

17859

63

by two-thirds of all the members elected to the council, it shall become operative notwithstanding the objections of the mayor. If any ordinance or resolution shall not be returned by the mayor within five days (Sunday excepted), after it shall have been presented to him, it shall become operative in like manner as if he had signed it, unless his term of office, or that of the council, shall expire within said five days.

The mayor shall have the power to veto any particular item or items of an appropriation ordinance or resolution; but the veto shall not affect any item or items to which he does not object. The item or items objected to shall not take effect except in the manner provided in this section as to ordinances or resolutions not approved by the mayor. No ordinance or resolution appropriating money exceeding the sum of one hundred dollars, imposing taxes, or authorizing the borrowing of money, shall be passed, except by a recorded affirmative vote of a majority of all the members elected to the council or to each branch thereof where there are two; and in case of the veto by the mayor of such ordinance or resolution, it shall require a recorded affirmative vote of two-thirds of all the members elected to the council, or to each branch thereof where there are two, to pass the same over such veto in the manner provided in this section. Nothing contained in this section shall operate to repeal or amend any provision in any existing city charter requiring a two-thirds vote for the passage of any ordinance as to the appropriation of money, imposing taxes or authorizing the borrowing of money.

Sec. 124. No street railway, gas, water, steam, or electric heating, electric light or power, cold storage, compressed air, viaduct, conduit, telephone, or bridge, company, nor any corporation, association, person or partnership, engaged in these or like enterprises, shall be permitted to use the streets, alleys, or public grounds of a city or town without the previous consent of the corporate authorities of such city or town.

Sec. 125. The rights of no city or town in and to its water front, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, and other public places, and its gas, water, and electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three-fourths of all the members elected to the council, or to each branch thereof where there are two, and under such other restrictions as may be imposed by law; and in case of the veto by the mayor of such an ordinance or resolution, it shall require a recorded affirmative vote of three-fourths of all the members elected to the council, or to each branch thereof where there are two, had in the manner heretofore provided for in this article, to pass the same over the veto. No franchise, lease or right of any kind to use any such public property or any other public property

or easement of any description, in a manner not permitted to the general public, shall be granted for a longer period than thirty years. Before granting any such franchise or privilege for a term of years, except for a trunk railway, the municipality shall first, after due advertisement, receive bids therefor publicly, in such manner as may be provided by law, and shall then act as may be required by law. Such grant, and any contract in pursuance thereof, may provide that upon the termination of the grant the plant as well as the property, if any, of the grantee in the streets, avenues, and other public places shall thereupon, without compensation to the grantee, or upon the payment of a fair valuation therefor, be and become the property of the said city or town; but the grantee shall be entitled to no payment by reason of the value of the franchise; and any such plant or property acquired by a city or town may be sold or leased, or, if authorized by law, maintained, controlled and operated, by such city or town. Every such grant shall specify the mode of determining any valuation therein provided for, and shall make adequate provision by way of forfeiture of the grant, or otherwise, to secure efficiency of public service at reasonable rates, and the maintenance of the property in good order throughout the term of the grant. Nothing herein contained shall be construed as preventing the General Assembly from prescribing additional restrictions on the powers of cities and towns in granting franchises or in selling or leasing any of their property, or as repealing any additional restriction now required in relation thereto in any existing municipal charter.

Sec. 126. The General Assembly shall provide by general laws for the extension and the contraction, from time to time, of the corporate limits of cities and towns; and no special act for such purpose shall be valid.

Sec. 127. No city or town shall issue any bonds or other interest-bearing obligations for any purpose, or in any manner, to an amount which, including existing indebtedness, shall, at any time, exceed eighteen per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes: provided, however, that nothing above contained in this section shall apply to those cities and towns whose charters existing at the adoption of this Constitution authorize a larger percentage of indebtedness than is authorized by this section: and provided further, that in determining the limitation of the power of a city or town to incur indebtedness there shall not be included the following classes of indebtedness:

(a.) Certificates of indebtedness, revenue bonds or other obligations issued in anticipation of the collection of the revenue of such city or town for the then current year; provided that such certificates, bonds or

17860
65

other obligations mature within one year from the date of their issue, and be not past due, and do not exceed the revenue for such year;

(b.) Bonds authorized by an ordinance enacted in accordance with section One Hundred and Twenty-three, and approved by the affirmative vote of the majority of the qualified voters of the city or town voting upon the question of their issuance, at the general election next succeeding the enactment of the ordinance, or at a special election held for that purpose, for a supply of water or other specific undertaking from which the city or town may derive a revenue; but from and after a period to be determined by the council, not exceeding five years from the date of such election, whenever and for so long as such undertaking fails to produce sufficient revenue to pay for cost of operation and administration (including interest on bonds issued therefor, and the cost of insurance against loss by injury to persons or property), and an annual amount to be covered into a sinking fund sufficient to pay, at or before maturity, all bonds issued on account of said undertaking, all such bonds outstanding shall be included in determining the limitation of the power to incur indebtedness, unless the principal and interest thereof be made payable exclusively from the receipts of the undertaking.

Sec. 128. In cities and towns the assessment of real estate and personal property for the purpose of municipal taxation, shall be the same as the assessment thereof for the purpose of state taxation, whenever there shall be a state assessment of such property.

ARTICLE IX.

EDUCATION AND PUBLIC INSTRUCTION.

Sec. 129. The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.

Sec. 130. The general supervision of the school system shall be vested in a State Board of Education, composed of the Governor, Attorney-General, Superintendent of Public Instruction, and three experienced educators to be elected quadrennially by the Senate, from a list of eligibles, consisting of one from each of the faculties, and nominated by the respective boards of visitors or trustees, of the University of Virginia, the Virginia Military Institute, the Virginia Polytechnic Institute, the State Female Normal School at Farmville, the School for the Deaf and Blind, and also of the College of William and Mary, so long as the State continue its annual appropriation to the last named institution.

The board thus constituted shall select and associate with itself two

division superintendents of schools, one from a county and the other from a city, who shall hold office for two years, and whose powers and duties shall be identical with those of other members, except that they shall not participate in the appointment of any public school official.

Any vacancy occurring during the term of any member of the board shall be filled for the unexpired term by said board.

Sec. 131. The Superintendent of Public Instruction, who shall be an experienced educator, shall be elected by the qualified voters of the State at the same time and for the same term as the Governor. Any vacancy in said office shall be filled for the unexpired term by the said board.

His duties shall be prescribed by the State Board of Education, of which he shall be *ex-officio* president; and his compensation shall be fixed by law.

Sec. 132. The duties and powers of the State Board of Education shall be as follows:

First. It may, in its discretion, divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall, subject to the confirmation of the Senate, appoint, for each of such divisions, one superintendent of schools, who shall hold office for four years, and shall prescribe his duties, and may remove him for cause and upon notice.

Second. It shall have, regulated by law, the management and investment of the school fund.

Third. It shall have authority to make all needful rules and regulations for the management and conduct of the schools, which, when published and distributed, shall have the force and effect of law, subject to the authority of the General Assembly to revise, amend, or repeal the same.

Fourth. It shall select text books and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties respectively.

Fifth. It shall appoint a board of directors, consisting of five members, to serve without compensation, which shall have the management of the State Library, and the appointment of a librarian and other employees thereof, subject to such rules and regulations as the General Assembly shall prescribe; but the Supreme Court of Appeals shall have the management of the law library and the appointment of the librarian and other employees thereof.

Sec. 133. Each magisterial district shall constitute a separate school

17861
67

district, unless otherwise provided by law. In each school district there shall be three trustees selected, in the manner and for the term of office prescribed by law.

Sec. 134. The General Assembly shall set apart as a permanent and perpetual literary fund, the present literary fund of the State; the proceeds of all public lands donated by Congress for public free school purposes; of all escheated property; of all waste and unappropriated lands; of all property accruing to the State by forfeiture, and all fines collected for offences committed against the State, and such other sums as the General Assembly may appropriate.

Sec. 135. The General Assembly shall apply the annual interest on the literary fund; that portion of the capitation tax provided for in the Constitution to be paid into the State treasury, and not returnable to the counties and cities; and an annual tax on property of not less than one nor more than five mills on the dollar to the schools of the primary and grammar grades, for the equal benefit of all of the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment: but if at any time the several kinds or classes of property shall be segregated for the purposes of taxation, so as to specify and determine upon what subjects state taxes and upon what subjects local taxes may be levied, then the General Assembly may otherwise provide for a fixed appropriation of state revenue to the support of the schools not less than that provided in this section.

Sec. 136. Each county, city, town if the same be a separate school district, and school district is authorized to raise additional sums by a tax on property, not to exceed in the aggregate five mills on the dollar in any one year, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require: provided, that such primary schools as may be established in any school year, shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The boards of supervisors of the several counties, and the councils of the several cities, and towns if the same be separate school districts, shall provide for the levy and collection of such local school taxes.

Sec. 137. The General Assembly may establish agricultural, normal, manual training and technical schools, and such grades of schools as shall be for the public good.

Sec. 138. The General Assembly may, in its discretion, provide for the

compulsory education of children between the ages of eight and twelve years, except such as are weak in body or mind, or can read and write, or are attending private schools, or are excused for cause by the district school trustees.

Sec. 139. Provision shall be made to supply children attending the public schools with necessary text-books in cases where the parent or guardian is unable, by reason of poverty, to furnish them.

Sec. 140. White and colored children shall not be taught in the same school.

Sec. 141. No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof: provided, first, that the General Assembly may, in its discretion, continue the appropriations to the College of William and Mary; second, that this section shall not be construed as requiring or prohibiting the continuance or discontinuance by the General Assembly of the payment of interest on certain bonds held by certain schools and colleges as provided by an act of the General Assembly, approved February twenty-third, eighteen hundred and ninety-two, relating to bonds held by schools and colleges; third, that counties, cities, towns, and districts may make appropriations to non-sectarian schools of manual, industrial, or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district.

Sec. 142. Members of the boards of visitors or trustees of educational institutions shall be appointed as may be provided by law, and shall hold for the term of four years: provided, that at the first appointment, if the board be of an even number, one-half of them, or, if of an odd number, the least majority of them, shall be appointed for two years.

ARTICLE X.

AGRICULTURE AND IMMIGRATION.

Sec. 143. There shall be a Department of Agriculture and Immigration, which shall be permanently maintained at the capital of the State, and which shall be under the management and control of a Board of Agriculture and Immigration, composed of one member from each congressional district, who shall be a practical farmer, appointed by the Governor for a term of four years, subject to confirmation by the Senate, and the president of the Virginia Polytechnic Institute, who shall be

17862
69

ex-officio a member of the board: provided, that members of the board first appointed under this Constitution from the congressional districts bearing odd numbers shall hold office for two years.

Sec. 144. The powers and duties of the board shall be prescribed by law: provided, that it shall have power to elect and remove its officers, and establish elsewhere in the State subordinate branches of said department.

Sec. 145. There shall be a Commissioner of Agriculture and Immigration, whose term of office shall be four years, and who shall be elected by the qualified voters of the State, and whose powers and duties shall be prescribed by the Board of Agriculture and Immigration until otherwise provided by law.

Sec. 146. The president of the Board of Agriculture and Immigration shall be *ex-officio* a member of the Board of Visitors of the Virginia Polytechnic Institute.

ARTICLE XI.

PUBLIC INSTITUTIONS AND PRISONS.

Sec. 147. There shall be a state penitentiary, with such branch prisons and prison farms as may be provided by law.

Sec. 148. There shall be appointed by the Governor, subject to confirmation by the Senate, a board of five directors which, subject to such regulations and requirements as may be prescribed by law, shall have the government and control of the penitentiary, branch prisons, and prison farms, and shall appoint the superintendents and surgeons thereof. The respective superintendents shall appoint, and may remove, all other officers and employees of the penitentiary, branch prisons, and prison farms, subject to the approval of the board of directors. The superintendents and surgeons shall be appointed for a term of four years, and be removable by the board of directors for misbehavior, incapacity, neglect of official duty, or acts performed without authority of law. The terms of the directors first appointed shall be one, two, three, four, and five years, respectively; and thereafter, upon the expiration of the term of a director, his successor shall be appointed for a term of five years.

Sec. 149. For each state hospital for the insane now existing, or hereafter established, there shall be a special board of directors, consisting of three members, who shall be appointed by the Governor, subject to confirmation by the Senate; such board shall have the management of the hospital for which it is appointed, under the supervision and con-

trol of the general board of directors hereinafter constituted. The terms of the directors first appointed shall be two, four, and six years, respectively, and thereafter, upon the expiration of the term of a member, his successor shall be appointed for a term of six years.

Sec. 150. There shall be a general board of directors for the control and management of all the state hospitals for the insane now existing or hereafter established, which shall consist of all the directors appointed members of the several special boards. The general board of directors shall be subject to such regulations and requirements as the General Assembly may from time to time prescribe, and shall have full power and control over the special boards of directors and all of the officers and employees of the said hospitals.

Sec. 151. The general board of directors shall appoint for a term of four years a superintendent for each hospital, who shall be removable by said board for misbehavior, incapacity, neglect of official duty, or acts performed without authority of law. The special board of each hospital, shall, subject to the approval of the general board, appoint for a term of four years all other resident officers. The superintendent of each hospital shall appoint, and may remove, with the approval of the special board, all other employees of such hospital.

Sec. 152. There shall be a Commissioner of State Hospitals for the Insane, who shall be appointed by the Governor, subject to confirmation by the Senate, for a term of four years. He shall be *ex-officio* chairman of the general and of each of the special boards of directors, and shall be responsible for the proper disbursement of all moneys appropriated or received from any source for the maintenance of such hospitals; he shall cause to be established and maintained at all of the hospitals a uniform system of keeping the records and the accounts of money received and disbursed and of making the reports thereof. He shall perform such other duties and shall execute such bond and receive such salary as may be prescribed by law.

ARTICLE XII.

CORPORATIONS.

Sec. 153. As used in this article, the term "corporation" or "company" shall include all trusts, associations and joint stock companies having any powers or privileges not possessed by individuals or unlimited partnerships, and exclude all municipal corporations and public institutions owned or controlled by the State; the term "charter" shall be con-

17863

strued to mean the charter of incorporation by, or under, which any such corporation is formed; the term "transportation company" shall include any company, trustee, or other person owning, leasing or operating for hire a railroad, street railway, canal, steamboat or steamship line, and also any freight car company, car association, or car trust, express company, or company, trustee or person in any way engaged in business as a common carrier over a route acquired in whole or in part under the right of eminent domain; the term "rate" shall be construed to mean "rate of charge for any service rendered or to be rendered"; the terms "rate," "charge" and "regulation," shall include joint rates, joint charges, and joint regulations, respectively; the term "transmission company" shall include any company owning, leasing, or operating for hire, any telegraph or telephone line; the term "freight" shall be construed to mean any property transported, or received for transportation, by any transportation company; the term "public service corporation" shall include all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley or public highway, whether along, over, or under the same, in a manner not permitted to the general public; the term "person," as used in this article, shall include individuals, partnerships and corporations, in the singular as well as plural number; the term "bond" shall mean all certificates, or written evidences, of indebtedness issued by any corporation and secured by mortgage or trust deed; the term "frank" shall be construed to mean any writing or token, issued by, or under authority of, a transmission company, entitling the holder to any service from such company free of charge. The provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Federal Constitution, and as if the necessary limitations upon their interpretation had been herein expressed in each case.

Sec. 154. The creation of corporations, and the extension and amendment of charters (whether heretofore or hereafter granted), shall be provided for by general laws, and no charter shall be granted, amended or extended by special act, nor shall authority in such matters be conferred upon any tribunal or officer, except to ascertain whether the applicants have, by complying with the requirements of the law, entitled themselves to the charter, amendment or extension applied for, and to issue, or refuse, the same accordingly. Such general laws may be amended or repealed by the General Assembly; and all charters and amendments of charters, now existing and revocable, or hereafter granted or extended, may be repealed at any time by special act. Provision shall

be made, by general laws, for the voluntary surrender of its charter by any corporation, and for the forfeiture thereof for non-user or mis-user. The General Assembly shall not, by special act, regulate the affairs of any corporation, nor, by such act, give it any rights, powers or privileges.

Sec. 155. A permanent commission, to consist of three members, is hereby created, which shall be known as the State Corporation Commission. The commissioners shall be appointed by the Governor, subject to confirmation by the General Assembly in joint session, and their regular terms of office shall be six years, respectively, except those first appointed under this Constitution, of whom, one shall be appointed to hold office until the first day of February, nineteen hundred and four, one, until the first day of February, nineteen hundred and six, and one, until the first day of February, nineteen hundred and eight. Whenever a vacancy in the commission shall occur, the Governor shall forthwith appoint a qualified person to fill the same for the unexpired term, subject to confirmation by the General Assembly as aforesaid. Commissioners appointed for regular terms shall, at the beginning of the terms for which appointed, and those appointed to fill vacancies shall, immediately upon their appointments, enter upon the duties of their office; but no person so appointed, either for a regular term, or to fill a vacancy, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment, or adjourned *sine die* without confirming the same, nor shall he be eligible for re-appointment to fill the vacancy caused by such refusal or failure to confirm. No person while employed by, or holding any office in relation to, any transportation or transmission company, or while in any wise financially interested therein, or while engaged in practicing law, shall hold office as a member of said commission, or perform any of the duties thereof. At least one of the commissioners shall have the qualifications prescribed for judges of the Supreme Court of Appeals; and any commissioner may be impeached or removed in the manner provided for the impeachment or removal of a judge of said court. The commission shall annually elect one of their members chairman of the same, and shall have one clerk, one bailiff and such other clerks, officers, assistants and subordinates as may be provided by law, all of whom shall be appointed, and subject to removal, by the commission. It shall prescribe its own rules of order and procedure, except so far as the same are specified in this Constitution or any amendment thereof. The General Assembly may establish within the department, and subject to the supervision and control, of the commission, subordinate divisions, or bureaus, of insurance, banking or other special branches of the business of that department. All sessions of

17864

the commission shall be public, and a permanent record shall be kept of all its judgments, rules, orders, findings and decisions, and of all reports made to, or by, it. Two of the commissioners shall constitute a quorum for the transaction of business, whether there be a vacancy in the commission or not. The commission shall keep its office open for business on every day except Sundays and legal holidays. Transportation companies shall at all times transport, free of charge, within this State, the members of said commission and its officers, or any of them, when engaged on their official duties. The General Assembly shall provide suitable quarters for the commission and funds for its lawful expenses, including pay for witnesses summoned, and costs of executing processes issued, by the commission of its own motion; and shall fix the salaries of the members, clerks, assistants and subordinates of the commission and provide for the payment thereof; but the salary of each commissioner shall not be less than four thousand dollars per annum. After the first day of January, nineteen hundred and eight, the General Assembly may provide for the election of the members of the commission by the qualified voters of the State; in which event, vacancies thereafter occurring shall be filled as hereinbefore provided, until the expiration of twenty days after the next general election, held not less than sixty days after the vacancy occurs, at which election the vacancy shall be filled for the residue of the unexpired term.

Sec. 156. (*a*) Subject to the provisions of this Constitution and to such requirements, rules and regulations as may be prescribed by law, the State Corporation Commission shall be the department of government through which shall be issued all charters and amendments or extensions thereof, for domestic corporations, and all licenses to do business in this State to foreign corporations; and through which shall be carried out all the provisions of this Constitution, and of the laws made in pursuance thereof, for the creation, visitation, supervision, regulation and control of corporations chartered by, or doing business in, this State. The commission shall prescribe the forms of all reports which may be required of such corporations by this Constitution or by law; it shall collect, receive, and preserve such reports, and annually tabulate and publish them in statistical form; it shall have all the rights and powers of, and perform all the duties devolving upon, the Railroad Commissioner and the Board of Public Works, at the time this Constitution goes into effect, except so far as they are inconsistent with this Constitution, or may be hereafter abolished or changed by law.

(*b*) The commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and

transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent with those prescribed by the commission, within the scope of its authority, shall be unlawful and void. The commission shall also have the right at all times to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discriminations by any transportation or transmission company in favor of or against, any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation or otherwise, in connection with the public duties of such company. Before the commission shall prescribe or fix any rate, charge, or classification of traffic, and before it shall make any order, rule, regulation or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation or requirement, shall first be given, by the commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before the commission shall make or prescribe any general order, rule, regulation or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation or requirement shall first be published in substance, not less than once a week for four consecutive weeks in one or more of the newspapers of general circulation

published in the city of Richmond, Virginia, together with notice of the time and place, when and where the commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation or requirement; and every such general order, rule, regulation or requirement, made by the commission shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, as long as it remains in force, be published in each subsequent annual report of the commission. The authority of the commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges and classifications of traffic, for transportation and transmission companies, shall be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the General Assembly to legislate thereon by general laws: provided, however, that nothing in this section shall impair the right which has heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or county to prescribe rules, regulations or rates of charge to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town or county, so far as such services may be wholly within the limits of the city, town or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the commission, as far as possible, to effect, by mediation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons.

(*c*) In all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and enforcing by its own appropriate process, against the delinquent or offending company (after it shall have been first duly cited, proceeded against by due process of law before the commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The commission may be vested with such additional powers, and charged with such other duties (not inconsistent with this Constitution) as may be

prescribed by law, in connection with the visitation, regulation or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the commission, within such reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed, or authorized, by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the commission, shall be a separate offence: provided, that should the operation of such order or requirement be suspended pending an appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

(*d*) From any action of the commission prescribing rates, charges or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as provided for in sub-section *e* of this section, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to costs, as may be prescribed by law) may be taken by the corporation whose rates, charges or classifications of traffic, schedule, facilities, conveniences or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the Commonwealth. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court of Appeals from the inferior courts, except that such an appeal shall be of right, and the Supreme Court of Appeals may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates, charges or classifications of traffic, schedules, facilities, conveniences or service are affected, the Commonwealth shall be made the appellee; but, in the other cases mentioned, the corporation so affected shall be made the appellee. The General Assembly may also, by general laws, provide for appeals from any other

action of the commission, by the Commonwealth or by any person interested, irrespective of the amount involved. All appeals from the commission shall be to the Supreme Court of Appeals only; and in all appeals to which the Commonwealth is a party, it shall be represented by the Attorney-General or his legally appointed representative. No court of this Commonwealth (except the Supreme Court of Appeals, by way of appeals as herein authorized), shall have jurisdiction to review, reverse, correct or annul any action of the commission, within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties: provided, however, that the writs of *mandamus* and prohibition shall lie from the Supreme Court of Appeals to the commission in all cases where such writs, respectively, would lie to any inferior tribunal or officer.

(*e*) Upon the granting of an appeal, a writ of *supersedeas* may be awarded by the appellate court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the appellate court, no action of the commission prescribing or affecting the rates, charges or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceedings resulting from such appeal, until a suspending bond shall first have been executed and filed with, and approved by, the commission (or approved on review by the Supreme Court of Appeals), payable to the Commonwealth, and sufficient in amount and security to insure the prompt refunding, by the appealing corporation to the parties entitled thereto, of all charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the court on appeal. The commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any *supersedeas*), of the order or requirement appealed from, to keep such accounts, and to make to the commission, from time to time, such reports, verified by oath, as may, in the judgment of the commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company pending the appeal, be not sustained on such appeal; and the commission shall also, from time to time, require such company, under like penalty, to give additional security on,

or to increase, the said suspending bond, whenever, in the opinion of the commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner, and through such methods of distribution, as may be prescribed by the commission, or by law. All such appeals affecting rates, charges or classifications of traffic, shall have precedence upon the docket of the appellate court, and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the *habeas corpus*, and Commonwealth's, cases already on the docket of the court.

(*f*) In no case of appeal from the commission shall any new or additional evidence be introduced in the appellate court; but the chairman of the commission, under the seal of the commission, shall certify to the appellate court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected, specified and required to be certified, by any party in interest, as well as such other evidence, so introduced or considered, as the commission may deem proper to certify. The commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the appellate court, upon disposing of the appeal. The appellate court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the commission appealed from, as well as any other matter arising under such appeal: provided, however, that the action of the commission appealed from shall be regarded as *prima facie* just, reasonable and correct: but the court may, when it deems necessary, in the interest of justice, remand to the commission any case pending on appeal, and require the same to be further investigated by the commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the commission by any party in interest), before the appeal is finally decided.

(*g*) Whenever the court, upon appeal, shall reverse an order of the commission affecting the rates, charges or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such order as, in its opinion, the commission should

have made at the time of entering the order appealed from; otherwise, the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the commission at the time the original order appealed from was entered. The right of the commission to prescribe and enforce rates, charges, classifications, rules and regulations, affecting any or all actions of the commission theretofore entered by it and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the commission, prescribing or altering such rates, charges, classifications, rules or regulations, shall be retroactive.

(*h*) The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding, shall the reasonableness, justness or validity of any rate, charge, classification of traffic, rule, regulation or requirement, theretofore prescribed by the commission, within the scope of its authority, and then in force, be questioned: provided, however, that no case based upon or involving any order of the commission shall be heard, or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court of Appeals as authorized by this Constitution or by any law passed in pursuance thereof.

(*i*) The commission shall make annual reports to the Governor of its proceedings, in which reports it shall recommend, from time to time, such new or additional legislation in reference to its powers or duties, or to the creation, supervision, regulation or control of corporations, or to the subject of taxation, as it may deem wise or expedient, or as may be required by law.

(*k*) Upon the organization of the State Corporation Commission, the Board of Public Works and the office of Railroad Commissioner, shall cease to exist; and all books, papers and documents pertaining thereto, shall be transferred to, and become a part of the records of, the office of the State Corporation Commission.

(*l*) After the first day of January, nineteen hundred and five, in ad-

dition to the modes of amendment provided for in Article Fifteen of this Constitution, the General Assembly, upon the recommendation of the State Corporation Commission, may, by law, from time to time, amend sub-sections *a* to *i*, inclusive, of this section, or any of them, or any such amendment thereof; provided, that no amendment made under authority of this sub-section shall contravene the provisions of any part of this Constitution other than the sub-sections last above referred to or any such amendment thereof.

Sec. 157. Provision shall be made by general laws for the payment of a fee to the Commonwealth by every domestic corporation, upon the granting, amendment or extension of its charter, and by every foreign corporation upon obtaining a license to do business in this State as specified in this section; and also for the payment, by every domestic corporation, and foreign corporation doing business in this State, of an annual registration fee of not less than five dollars nor more than twenty-five dollars, which shall be irrespective of any specific license, or other, tax imposed by law upon such company for the privilege of carrying on its business in this State, or upon its franchise or property; and for the making, by every such corporation (at the time of paying such annual registration fee), of such report to the State Corporation Commission, of the status, business or condition of such corporation, as the General Assembly may prescribe. No foreign corporation shall have authority to do business in this State, until it shall have first obtained from the commission a license to do business in this State, upon such terms and conditions as may be prescribed by law. The failure by any corporation for two successive years to pay its annual registration fee, or to make its said annual reports, shall, when such failure shall have continued for ninety days after the expiration of such two years, operate as a revocation and annulment of the charter of such corporation if it be a domestic company, or, of its license to do business in this State if it be a foreign company; and the General Assembly shall provide additional and suitable penalties for the failure of any corporation to comply promptly with the requirements of this section, or of any laws passed in pursuance thereof. The commission shall compel all corporations to comply promptly with such requirements, by enforcing, in the manner hereinbefore authorized, such fines and penalties against the delinquent company as may be provided for, or authorized by, this article; but the General Assembly may relieve from the payment of the said registration fee any purely charitable institution or institutions.

Sec. 158. Every corporation heretofore chartered in this State, which shall hereafter accept, or effect, any amendment or extension of its

17868

charter, shall be conclusively presumed to have thereby surrendered every exemption from taxation, and every non-repealable feature of its charter and of the amendments thereof, and also all exclusive rights or privileges theretofore granted to it by the General Assembly and not enjoyed by other corporations of a similar general character; and to have thereby agreed to thereafter hold its charter and franchises, and all amendments thereof, under the provisions and subject to all the requirements, terms and conditions of this Constitution and of any laws passed in pursuance thereof, so far as the same may be applicable to such corporation.

Sec. 159. The exercise of the right of eminent domain shall never be abridged, nor so construed as to prevent the General Assembly from taking the property and franchises of corporations and subjecting them to public use, the same as the property of individuals; and the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State.

Sec. 160. No transportation or transmission company shall charge or receive any greater compensation, in the aggregate, for transporting the same class of passengers or property, or for transmitting the same class of messages, over a shorter than over a longer distance, along the same line and in the same direction—the shorter being included in the longer distance; but this section shall not be construed as authorizing any such company to charge or receive as great compensation for a shorter as for a longer distance. The State Corporation Commission may, from time to time, authorize any such company to disregard the foregoing provisions of this section, by charging such rates as the commission may prescribe as just and equitable between such company and the public, to or from any junctional or competitive points or localities, or where the competition of points located without this State may make necessary the prescribing of special rates for the protection of the commerce of this State; but this section shall not apply to mileage tickets, or to any special excursion, or commutation, rates, or to special rates for services rendered to the government of this State, or of the United States, or in the interest of some public object, when such tickets or rates shall have been prescribed or authorized by the commission.

Sec. 161. No transportation or transmission company doing business in this State shall grant to any member of the General Assembly, or to any State, county, district or municipal officer, except to members and officers of the State Corporation Commission for their personal use while in office, any frank, free pass, free transportation, or any rebate

or reduction in the rates charged by such company to the general public for like services. For violation of the provisions of this section the offending company shall be liable to such penalties as may be prescribed by law; and any member of the General Assembly, or any such officer, who shall, while in office, accept any gift, privilege or benefit as is prohibited by this section, shall thereby forfeit his office, and be subject to such further penalties as may be prescribed by law; but this section shall not prevent a street railway company from transporting free of charge any member of the police force or fire department while in the discharge of his official duties, nor prohibit the acceptance by any such policeman or fireman of such free transportation.

Sec. 162. The doctrine of fellow-servant, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is, to the extent hereinafter stated, abolished as to every employee of a railroad company, engaged in the physical construction, repair or maintenance of its roadway, track or any of the structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine, or switch, or in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master, that a servant would have (at the time when this Constitution goes into effect), if such acts or omissions were those of the master himself in the performance of a non-assignable duty: provided, that the injury, so suffered by such railroad employee, result from the negligence of an officer, or agent, of the company of a higher grade of service than himself, or from that of a person, employed by the company, having the right, or charged with the duty, to control or direct the general services or the immediate work of the party injured, or the general services or the immediate work of the co-employee through, or by, whose act or omission he is injured; or that it result from the negligence of a co-employee engaged in another department of labor, or engaged upon, or in charge of, any car upon which, or upon the train of which it is a part, the injured employee is not at the time of receiving the injury, or who is in charge of any switch, signal point, or locomotive engine, or is charged with dispatching trains or transmitting telegraphic or telephonic orders therefor; and whether such negligence be in the performance of an assignable or non-assignable duty. The physical construction, repair or maintenance of the roadway, track or any of the structures connected therewith, and the physical construction,

17869

repair, maintenance, cleaning or operation of trains, cars or engines, shall be regarded as different departments of labor within the meaning of this section. Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defence to an action for injury caused thereby. When death, whether instantaneous or not, results to such an employee from any injury for which he could have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort, and relatives (and any trustee, curator, committee or guardian of such consort or relatives) shall, respectively, have the same rights and remedies with respect thereto as if his death had been caused by the negligence of a co-employee while in the performance, as vice-principal, of a non-assignable duty of the master. Every contract or agreement, express or implied, made by an employee, to waive the benefit of this section, shall be null and void. This section shall not be construed to deprive any employee, or his legal or personal representative, surviving consort or relatives (or any trustee, curator, committee or guardian of such consort or relatives), of any rights or remedies that he or they may have by the law of the land, at the time this Constitution goes into effect. Nothing contained in this section shall restrict the power of the General Assembly to further enlarge, for the above-named class of employees, the rights and remedies hereinbefore provided for, or to extend such rights and remedies to, or otherwise enlarge the present rights and remedies of, any other class of employees of railroads or of employees of any person, firm or corporation.

Sec. 163. No foreign corporation shall be authorized to carry on, in this State, the business, or to exercise any of the powers or functions, of a public service corporation, or be permitted to do anything which domestic corporations are prohibited from doing, or be relieved from compliance with any of the requirements made of similar domestic corporations by the Constitution and laws of this State, where the same can be made applicable to such foreign corporation without discriminating against it. But this section shall not affect any public service corporation whose line or route extends across the boundary of this Commonwealth, nor prevent any foreign corporation from continuing in such lawful business as it may be actually engaged in within this State, when this Constitution goes into effect; but any such foreign public service corporation, so engaged, shall not, without first becoming incorporated under the laws of this State, be authorized to acquire, lease, use or operate, within this State, any public or municipal franchise or fran-

chises in addition to such as it may own, lease, use or operate when this Constitution goes into effect. The property, within this State, of foreign corporations shall always be subject to attachment, the same as that of non-resident individuals; and nothing in this section shall restrict the power of the General Assembly to discriminate against foreign corporations whenever, and in whatsoever respect, it may deem wise or expedient.

Sec. 164. The right of the Commonwealth, through such instrumentalities as it may select, to prescribe and define the public duties of all common carriers and public service corporations, to regulate and control them in the performance of their public duties, and to fix and limit their charges therefor, shall never be surrendered nor abridged.

Sec. 165. The General Assembly shall enact laws preventing all trusts, combinations and monopolies, inimical to the public welfare.

Sec. 166. The exclusive right to build or operate railroads parallel to its own, or any other, line of railroad, shall not be granted to any company; but every railroad company shall have the right, subject to such reasonable regulations as may be prescribed by law, to parallel, intersect, connect with or cross, with its roadway, any other railroad or railroads; but no railroad company shall build or operate any line of railroad not specified in its charter, or in some amendment thereof. All railroad companies, whose lines of railroad connect, shall receive and transport each other's passengers, freight, and loaded or empty cars, without delay or discrimination. Nothing in this section shall deprive the General Assembly of the right to prevent by statute, repealable at pleasure, any railroad from being built parallel to the present line of the Richmond, Fredericksburg and Potomac railroad.

Sec. 167. The General Assembly shall enact general laws regulating and controlling all issues of stock and bonds by corporations. Whenever stock or bonds are to be issued by a corporation, it shall, before issuing the same, file with the State Corporation Commission a statement (verified by the oath of the president or secretary of the corporation, and in such form as may be prescribed or permitted by the commission) setting forth fully and accurately the basis, or financial plan, upon which such stock or bonds are to be issued; and where such basis or plan includes services or property (other than money), received or to be received by the company, such statement shall accurately specify and describe, in the manner prescribed, or permitted, by the commission, the services and property, together with the valuation at which the same are received or to be received; and such corporation shall comply with any other requirements or restrictions which may be imposed by law. The

17870

General Assembly shall provide adequate penalties for the violation of this section, or of any laws passed in pursuance thereof; and it shall be the duty of the commission to adjudge, and enforce (in the manner hereinbefore provided), against any corporation refusing or failing to comply with the provisions of this section, or of any laws passed in pursuance thereof, such fines and penalties as are authorized by this Constitution, or may be prescribed by law.

ARTICLE XIII.

TAXATION AND FINANCE.

Sec. 168. All property, except as hereinafter provided, shall be taxed; all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

Sec. 169. Except as hereinafter provided, all assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. The General Assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added. Nothing in this Constitution shall prevent the General Assembly, after the first day of January, nineteen hundred and thirteen, from segregating for the purposes of taxation, the several kinds or classes of property, so as to specify and determine upon what subjects, state taxes, and upon what subjects, local taxes may be levied.

Sec. 170. The General Assembly may levy a tax on incomes in excess of six hundred dollars per annum; may levy a license tax upon any business which cannot be reached by the *ad valorem* system; and may impose state franchise taxes, and in imposing a franchise tax, may, in its discretion, make the same in lieu of taxes upon other property, in whole or in part, of a transportation, industrial, or commercial corporation. Whenever a franchise tax shall be imposed upon a corporation doing business in this State, or whenever all the capital, however invested, of a corporation chartered under the laws of this State, shall be taxed, the shares of stock issued by any such corporation, shall not be further taxed. No city or town shall impose any tax or assessment upon abutting land owners for street or other public local improvements, except for making and improving the walkways upon then existing streets, and improving

and paving then existing alleys, and for either the construction, or for the use of sewers; and the same when imposed, shall not be in excess of the peculiar benefits resulting therefrom to such abutting land owners. Except in cities and towns, no such taxes or assessments, for local public improvements shall be imposed on abutting land owners.

Sec. 171. The General Assembly shall provide for a re-assesement of real estate, in the year nineteen hundred and five, and every fifth year thereafter, except that of railway and canal corporations, which, after January the first, nineteen hundred and thirteen, may be assessed as the General Assembly may provide.

Sec. 172. The General Assembly shall provide for the special and separate assessment of all coal and other mineral land; but until such special assessment is made, such land shall be assessed under existing laws.

Sec. 173. The General Assembly shall levy a state capitation tax of, and not exceeding, one dollar and fifty cents per annum on every male resident of the State not less than twenty-one years of age, except those pensioned by this State for military services; one dollar of which shall be applied exclusively in aid of the public free schools, in proportion to the school population, and the residue shall be returned and paid by the State into the treasury of the county or city in which it was collected, to be appropriated by the proper county or city authorities to such county or city purposes as they shall respectively determine; but said state capitation tax shall not be a lien upon, nor collected by legal process from, the personal property which may be exempt from levy or distress under the poor debtor's law. The General Assembly may authorize the board of supervisors of any county, or the council of any city or town, to levy an additional capitation tax not exceeding one dollar per annum on every such resident within its limits, which shall be applied in aid of the public schools of such county, city or town, or for such other county, city or town purposes as they shall determine.

Sec. 174. After this Constitution shall be in force, no statute of limitation shall run against any claim of the State for taxes upon any property; nor shall the failure to assess property for taxation defeat a subsequent assessment for and collection of taxes for any preceding year or years, unless such property shall have passed to a *bona fide* purchaser for value, without notice; in which latter case the property shall be assessed for taxation against such purchaser from the date of his purchase.

Sec. 175. The natural oyster beds, rocks, and shoals, in the waters of this State, shall not be leased, rented or sold, but shall be held in trust

17871

for the benefit of the people of this State, subject to such regulations and restrictions as the General Assembly may prescribe, but the General Assembly may, from time to time, define and determine such natural beds, rocks or shoals, by surveys or otherwise.

Sec. 176. The State Corporation Commission shall annually ascertain and assess, at the time hereinafter mentioned, and in the manner required of the Board of Public Works, by the law in force on January the first, nineteen hundred and two, the value of the roadbed, and other real estate, rolling stock, and all other personal property whatsoever (except its franchise and the non-taxable shares of stock issued by other corporations) in this State, of each railway corporation, whatever its motive power, now or hereafter liable for taxation upon such property; the canal bed and other real estate, the boats and all other personal property whatsoever (except its franchise and the non-taxable shares of stock issued by other corporations) in this State, of each canal corporation, empowered to conduct transportation; and such property shall be taxed for state, county, city, town, and district purposes in the same manner as authorized by said law, at such rates of taxation as may be imposed by them, respectively, from time to time, upon the real estate and personal property of natural persons: provided, that no tax shall be laid upon the net income of such corporations.

Sec. 177. Each such railway or canal corporation, including also any such as is exempt from taxation as to its works, visible property, or profits, shall also pay an annual state franchise tax equal to one per centum upon the gross receipts hereinafter specified in section One Hundred and Seventy-eight, for the privilege of exercising its franchises in this State, which, with the taxes provided for in section One Hundred and Seventy-six, shall be in lieu of all other taxes or license charges whatsoever upon the franchises of such corporation, the shares of stock issued by it, and upon its property assessed under section One Hundred and Seventy-six: provided, that nothing herein contained shall exempt such corporation from the annual fee required by section One Hundred and Fifty-seven of this Constitution, or from assessments for street and other public local improvements authorized by section One Hundred and Seventy; and provided, further, that nothing herein contained shall annul or interfere with, or prevent any contract or agreement by ordinance between street railway corporations and municipalities, as to compensation for the use of the streets or alleys of such municipalities by such railway corporations.

Sec. 178. The amount of such franchise tax shall be equal to one per centum of the gross transportation receipts of such corporations for the

year ending June the thirtieth of each year, to be ascertained by the State Corporation Commission, in the following manner:

(a) When the road or canal of the corporation lies wholly within this State, the tax shall be equal to one per centum of the entire gross transportation receipts of such corporation.

(b) When the road or canal of the corporation lies partly within and partly without this State, or is operated as a part of a line or system extending beyond this State, the tax shall be equal to one per centum of the gross transportation receipts earned within this State, to be determined as follows: By ascertaining the average gross transportation receipts per mile over its whole extent within and without this State, and multiplying the result by the number of miles operated within this State: provided, that from the sum so ascertained there may be a reasonable deduction because of any excess of value of the terminal facilities or other similar advantages in other states over similar facilities or advantages in this State.

Sec. 179. Each corporation mentioned in sections One Hundred and Seventy-six and One Hundred and Seventy-seven shall annually, on the first day of September, make to the State Corporation Commission the report which the law, in force January the first, nineteen hundred and two, required to be made annually to the Board of Public Works by every railroad and canal company in this State, not exempt from taxation by virtue of its charter, which report shall also show the property taxable in this State belonging to the corporation on the thirtieth day of June preceding, and its total gross transportation receipts for the year ending on that date. Upon receiving such report the State Corporation Commission shall, after thirty days' notice previously given, as provided by said law, assess the value of the property not exempt from taxation, of the corporation, and ascertain the amount of the franchise tax and other state taxes chargeable against it. All taxes for which the corporation is liable shall be paid on or before the first day of December following. The provisions of said law, except as changed by this article, shall apply to the ascertainment and collection of the franchise, as well as other taxes of such corporations. Said taxes, until paid, shall be a lien upon the property within this State of the corporation owning the same, and take precedence of all other liens or incumbrances.

Sec. 180. Any corporation aggrieved by the assessment and ascertainment made under sections One Hundred and Seventy-six and One Hundred and Seventy-eight may, within thirty days after receiving a certified copy thereof, apply for relief to the circuit court of the city of Richmond. Notice of the application, setting forth the grounds of com-

17872

plaint, verified by affidavit, shall be served on the State Corporation Commission, and on the Attorney-General whose duty it shall be to represent the State. The court, if of opinion that the assessment or tax is excessive, shall reduce the same; but, if of opinion, that it is insufficient, shall increase the same. Unless the applicant paid the taxes under protest, when due, the court, if it disallow the application, shall give judgment against it for a sum, by way of damages, equal to interest at the rate of one per centum per month upon the amount of taxes from the time the same were payable. If the application be allowed, in whole or in part, appropriate relief shall be granted, including the right to recover any excess of taxes that may have been paid, with legal interest thereon, and costs, from the State or local authorities, or both, as the case may be; the judgment to be enforceable by *mandamus* or other proper process issuing from the court finally adjudicating the application. Subject to the provisions of Article Six of this Constitution, the Supreme Court of Appeals may allow a writ of error to either party.

Sec. 181. After January the first, nineteen hundred and three, the system of taxation, as to the corporations mentioned in sections One Hundred and Seventy-six and One Hundred and Seventy-seven, shall be as set forth in sections One Hundred and Seventy-six to One Hundred and Eighty, inclusive; and for that year the franchise tax shall be based upon such gross receipts for the year ending the thirtieth day of June, nineteen hundred and three, and such system shall so remain until the first day of January, nineteen hundred and thirteen, and thereafter until modified or changed, as may be prescribed by law: provided, that, if the said system shall for any reason become inoperative, the General Assembly shall have power to adopt some other system.

Sec. 182. Until otherwise prescribed by law, the shares of stock issued by trust or security companies chartered by this State, and by incorporated banks, shall be taxed in the same manner in which the shares of stock issued by incorporated banks were taxed, by the law in force January the first, nineteen hundred and two; but from the total assessed value of the shares of stock of any such company or bank, there shall be deducted the assessed value of its real estate otherwise taxed in this State, and the value of each share of stock shall be its proportion of the remainder.

Sec. 183. Except as otherwise provided in this Constitution, the following property and no other, shall be exempt from taxation, state and local; but the General Assembly may hereafter tax any of the property hereby exempted save that mentioned in sub-section (a):

(a) Property directly or indirectly owned by the State, however held,

and property lawfully owned and held by counties, cities, towns, or school districts, used wholly and exclusively for county, city, town, or public-school purposes, and obligations issued by the State since the fourteenth day of February, eighteen hundred and eighty-two or hereafter exempted by law.

(b) Buildings with land they actually occupy, and the furniture and furnishings therein lawfully owned and held by churches or religious bodies, and wholly and exclusively used for religious worship, or for the residence of the minister of any such church or religious body, together with the additional adjacent land reasonably necessary for the convenient use of any such building.

(c) Private family burying-grounds not exceeding one acre in area, reserved as such by will or deed, or shown by other sufficient evidence to be reserved as such, and so exclusively used, and public burying-grounds and lots therein exclusively used for burial purposes, and not conducted for profit, whether owned or managed by local authorities or by private corporations.

(d) Buildings with the land they actually occupy and the furniture, furnishings, books and instruments therein, wholly devoted to educational purposes, belonging to, and actually and exclusively occupied and used by churches, public libraries, incorporated colleges, academies, industrial schools, seminaries, or other incorporated institutions of learning, including the Virginia Historical Society, which are not corporations having shares of stock or otherwise owned by individuals or other corporations; together with such additional adjacent land owned by such churches, libraries and educational institutions as may be reasonably necessary for the convenient use of such buildings, respectively; and also the buildings thereon used as residences by the officers or instructors of such educational institutions; and also the permanent endowment funds held by such libraries and educational institutions directly or in trust, and not invested in real estate: provided, that such libraries and educational institutions are not conducted for profit of any person or persons, natural or corporate, directly, or under any guise or pretence whatsoever. But the exemption mentioned in this sub-section shall not apply to any industrial school, individual or corporate, not the property of the State, which does work for compensation, or manufactures and sells articles, in the community in which such school is located; provided, that nothing herein contained shall restrict any such school from doing work for or selling its own products or any other articles to any of its students or employees.

(e) Real estate belonging to, actually and exclusively occupied, and

17873

used by, and personal property, including endowment funds, belonging to Young Men's Christian Associations, and other similar religious associations, orphan or other asylums, reformatories, hospitals and nunneries, which are not conducted for profit, but purely and completely as charities.

(f) Buildings with the land they actually occupy, and the furniture and furnishings therein, belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes; and

(g) Property belonging to the Association for the Preservation of Virginia Antiquities, the Confederate Memorial Literary Society, and the Mount Vernon Ladies' Association of the Union.

No inheritance tax shall be charged, directly or indirectly, against any legacy or devise made according to law for the benefit of any institution or other body or any natural or corporate person whose property is exempt from taxation as hereinbefore mentioned in this section.

Nothing contained in this section shall be construed to exempt from taxation the property of any person, firm, association or corporation, who shall, expressly or impliedly, directly or indirectly, contract or promise to pay any sum of money or other benefit, on account of death, sickness, or accident to any of its members or any other person; and whenever any building or land, or part thereof, mentioned in this section and not belonging to the State, shall be leased or shall be a source of revenue or profit, all of such buildings and land shall be liable to taxation as other land and buildings in the same county, city, or town; and nothing herein contained shall be construed as authorizing or requiring any county, city, or town to tax for county, city or town purposes, in violation of the rights of the lessees thereof existing under any lawful contract heretofore made, any real estate owned by such county, city or town, and heretofore leased by it.

Obligations issued by counties, cities, or towns may be exempted by the authorities of such localities from local taxation.

Sec. 184. No debt shall be contracted by the State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war. No scrip, certificate, or other evidence of state indebtedness, shall be issued except for the transfer or redemption of stock previously issued, or for such debts as are expressly authorized in this Constitution.

Sec. 185. Neither the credit of the State, nor of any county, city, or town, shall be, directly or indirectly, under any device or pretence what-

soever, granted to or in aid of any person, association, or corporation; nor shall the State, or any county, city, or town subscribe to or become interested in the stock or obligations of any company, association, or corporation, for the purpose of aiding in the construction or maintenance of its work; nor shall the State become a party to or become interested in any work of internal improvement, except public roads, or engaged in carrying on any such work; nor assume any indebtedness of any county, city, or town, nor lend its credit to the same; but this section shall not prevent a county, city or town from perfecting a subscription to the capital stock of a railroad company authorized by existing charter conditioned upon the affirmative vote of the voters and freeholders of such county, city or town in favor of such subscription: provided, that such vote be had prior to July first, nineteen hundred and three.

Sec. 186. All taxes, licenses, and other revenue of the State, shall be collected by its proper officers and paid into the state treasury. No money shall be paid out of the state treasury except in pursuance of appropriations made by law; and no such appropriation shall be made which is payable more than two years after the end of the session of the General Assembly, at which the law is enacted authorizing the same; and no appropriation shall be made for the payment of any debt or obligation created in the name of the State during the war between the Confederate States and the United States. Nor shall any county, city, or town pay any debt or obligation created by such county, city, or town in aid of said war.

Sec. 187. The General Assembly shall provide and maintain a sinking fund in accordance with the provisions of section Ten of the act, approved February the twentieth, eighteen hundred and ninety-two, entitled "an act to provide for the settlement of the public debt of Virginia not funded under the provisions of an act entitled an act to ascertain and declare Virginia's equitable share of the debt created before, and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of the interest thereon, approved February the fourteenth, eighteen hundred and eighty-two." Every law hereafter enacted by the General Assembly, creating a debt or authorizing a loan, shall provide for the creation and maintenance of a sinking fund for the payment or redemption of the same.

Sec. 188. No other or greater amount of tax or revenue shall, at any time, be levied than may be required for the necessary expenses of the government, or to pay the indebtedness of the State.

17874

Sec. 189. On all lands and the improvements thereon, and on all tangible personal property, not exempt from taxation by the provisions of this article, the rate of state taxation shall be twenty cents on every hundred dollars of the assessed value thereof, the proceeds of which shall be applied to the expenses of the government and the indebtedness of the State, and a further tax of ten cents on every hundred dollars of the assessed value thereof, which shall be applied to the support of the public free schools of the State: provided, that after the first day of January, nineteen hundred and seven, the tax rate upon said real and personal property, for such purposes shall be prescribed by law. But the General Assembly during such period of four years, in addition to making annually an appropriation for pensions not to exceed the last appropriation made for such purpose prior to September the thirtieth, nineteen hundred and one, may levy annually, a special tax for pensions, on such real and personal property of not exceeding five cents on the hundred dollars of the assessed value thereof.

ARTICLE XIV.

MISCELLANEOUS PROVISIONS.

HOMESTEAD AND OTHER EXEMPTIONS.

Sec. 190. Every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnishment, or sale under any execution, order, or other process issued on any demand for a debt hereafter contracted, his real and personal property, or either, including money and debts due him, to the value of not exceeding two thousand dollars, to be selected by him: provided, that such exemption shall not extend to any execution, order, or other process issued on any demand in the following cases:

First. For the purchase price of said property, or any part thereof. If the property purchased, and not paid for, be exchanged for, or converted into, other property by the debtor, such last-named property shall not be exempted from the payment of such unpaid purchase money under the provisions of this article;

Second. For services rendered by a laboring person or mechanic;

Third. For liabilities incurred by any public officer, or officer of a court, or any fiduciary, or any attorney-at-law for money collected;

Fourth. For a lawful claim for any taxes, levies, or assessments accruing after the first day of June, eighteen hundred and sixty-six;

Fifth. For rent;

Sixth. For the legal or taxable fees of any public officer or officer of a court.

Sec. 191. The said exemption shall not be claimed or held in a shifting stock of merchandise, or in any property, the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration.

Sec. 192. The General Assembly shall prescribe the manner and the conditions on which a householder or head of a family shall set apart and hold for himself and family a homestead in any of the property hereinbefore mentioned. But this section shall not be construed as authorizing the General Assembly to defeat or impair the benefits intended to be conferred by the provisions of this article.

Sec. 193. Nothing contained in this article shall invalidate any homestead exemption heretofore claimed under the provisions of the former Constitution; or impair in any manner the right of any householder or head of a family existing at the time that this Constitution goes into effect, to select the exemption, or any part thereof, to which he was entitled under the former Constitution; provided that such right, if hereafter exercised, be not in conflict with the exemptions set forth in sections One Hundred and Ninety and One Hundred and Ninety-one. But no person who has selected and received the full exemption allowed by the former Constitution shall be entitled to select an additional exemption under this Constitution; and no person who has selected and received part of the exemption allowed by the former Constitution shall be entitled to select an additional exemption beyond the difference between the value of such part and a total valuation of two thousand dollars. So far as necessary to accomplish the purposes of this section the provisions of chapter One Hundred and Seventy-eight of the Code of Virginia, and the acts amendatory thereof, shall remain in force until repealed by the General Assembly. The provisions of this article shall be liberally construed.

Sec. 194. The General Assembly is hereby prohibited from passing any law staying the collection of debts, commonly known as "stay laws"; but this section shall not be construed as prohibiting any legislation which the General Assembly may deem necessary to fully carry out the provisions of this article.

HEIRS OF PROPERTY.

Sec. 195. The children of parents, one or both of whom were slaves at and during the period of cohabitation, and who were recognized by the father as his children, and whose mother was recognized by such father as his wife, and was cohabited with as such, shall be as capable of inheriting any estate whereof such father may have died seised, or possessed, or to which he was entitled, as though they had been born in lawful wedlock.

ARTICLE XV.

FUTURE CHANGES IN THE CONSTITUTION.

Sec. 196. Any amendment or amendments to the Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes taken thereon, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates, and shall be published for three months previous to the time of such election. If, at such regular session the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such times as it shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors, qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall become part of the Constitution.

Sec. 197. At such time as the General Assembly may provide, a majority of the members elected to each house being recorded in the affirmative, the question, "shall there be a convention to revise the Constitution and amend the same?" shall be submitted to the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified, voting thereon, shall vote in favor of a convention for such purpose, the General Assembly, at its next session, shall provide for the election of delegates to such convention; and no convention for such purpose shall be otherwise called.

SCHEDULE.

That no inconvenience may arise from the adoption of this Constitution, and in order to provide for carrying it into complete operation, it is hereby ordained that:

Section 1. The common law and the statute laws in force at the time this Constitution goes into effect, so far as not repugnant thereto or repealed thereby, shall remain in force until they expire by their own limitation, or are altered or repealed by the General Assembly.

Sec. 2. All ordinances adopted by this Convention, and appended to the official original draft of the Constitution delivered to the Secretary of the Commonwealth, shall have the same force and effect, as if they were parts of this Constitution.

Sec. 3. Except as modified by this Constitution, all writs, actions and causes of action, prosecutions, rights of individuals, of bodies corporate or politic, and of the State, shall continue. All legal proceedings, civil and criminal, pending at the time this Constitution goes into effect, or instituted prior to the first day of February, nineteen hundred and four, in any county or circuit court as now existing, shall be prosecuted therein: provided, that all such matters, which are not finally terminated before the day last above mentioned, shall, on that date, by operation of this Constitution and Schedule, be transferred to the circuit court of the county or city created under this Constitution, and shall be proceeded with therein. All such matters pending in the city courts, preserved by this Constitution, when the same goes into effect, or thereafter instituted therein, shall continue in said courts, and be therein proceeded with, until otherwise provided by law. All matters before justices of the peace or police justices at the time this Constitution goes into effect, shall be proceeded with before them, until otherwise provided by law. All legal proceedings prosecuted after this Constitution goes into effect, whether in any of the courts now existing, or in those created by this Constitution, shall be proceeded with in the manner now or hereafter provided by law, except as otherwise required by this Constitution.

Sec. 4. All taxes, fines, penalties, forfeitures and escheats, accrued or accruing to the Commonwealth, or to any political subdivision

thereof, under the present Constitution, or under the laws now in force, shall, under this Constitution, enure to the use of the Commonwealth, or of such subdivision thereof.

Sec. 5. All recognizances, and other obligations, and all other instruments entered into or executed before the adoption of this Constitution, or before the complete organization of the departments thereunder, to the Commonwealth, or to any county, or political subdivision thereof, city, town, board, or other public corporation, or institution therein, or to any public officer, shall remain binding and valid, and rights and liabilities thereunder shall continue and may be enforced or prosecuted in the courts of this State as now or hereafter provided by law.

Sec. 6. From the day this Constitution goes into effect, the present judges of the Supreme Court of Appeals, or their successors then in office, shall be the judges of the Supreme Court of Appeals created by this Constitution, and continue in office, unless sooner removed, until February the first, nineteen hundred and seven. The jurisdiction of the court shall be as now or hereafter provided by law, subject to the provisions of this Constitution. All proceedings, then pending in the court as now organized, shall, by virtue of this Constitution, be transferred to and disposed of by the court created by this Constitution.

Sec. 7. The present judicial system of county and circuit courts of the Commonwealth is continued, and the terms of the several judges thereof, with the powers and duties now possessed by them respectively, are continued, until the first day of February, nineteen hundred and four, as if this Constitution had not been adopted; on which day the judicial system of circuit courts created by this Constitution shall go into operation. The terms of the judges of the city courts, as preserved by this Constitution, of the cities of Alexandria, Charlottesville, Danville, Fredericksburg, Lynchburg, Petersburg, Norfolk, Portsmouth, Richmond, Staunton, Manchester, Roanoke, Winchester, and Newport News, shall continue until the first day of February, nineteen hundred and seven; and the terms of the judges of the city courts, as preserved by this Constitution, of the cities of Bristol, Radford and Buena Vista, shall continue until the first day of February, nineteen hundred and four, unless the said courts shall be sooner abolished. The privilege now allowed by statute to judges of county courts and to judges of certain city courts to practice law, shall continue during the terms of the judges whose terms are continued by this Schedule, unless otherwise provided by law.

Sec. 8. The terms of the clerks of the county and circuit courts now in office, or their successors, shall continue until the first day of Feb-

ruary, nineteen hundred and four; and thereupon, the several clerks of the county courts in those counties in which such clerks are now *ex-officio* clerks of the circuit courts of said counties shall be and become the county clerks of their respective counties, and the clerks of all the other county courts of the State, except the counties of Accomac, Augusta, Bedford, Campbell, Elizabeth City, Fairfax, Lee, Loudoun, Hanover, Henrico, Rockingham, Nansemond, Southampton, Pittsylvania, Nelson, and Wythe, and, as such, the clerks of the circuit courts created therefor by this Constitution, and shall hold office as such until the first day of January, nineteen hundred and six, unless sooner removed, and their successors shall be elected on Tuesday after the first Monday in November, nineteen hundred and five; provided that the first term of the clerks so elected be for six years. In the counties of Accomac, Augusta, Bedford, Campbell, Elizabeth City, Fairfax, Lee, Loudoun, Hanover, Henrico, Rockingham, Nansemond, Southampton, Pittsylvania, Nelson, and Wythe, in which there are now separate clerks for the county and circuit courts thereof, there shall be elected on Tuesday after the first Monday in November, nineteen hundred and three, county clerks for such counties. The terms of the clerks now in office, or their successors, of the several city courts preserved by this Constitution, shall continue until the first day of January, nineteen hundred and seven; and their successors shall be elected on Tuesday after the first Monday in November, nineteen hundred and five; but if any of such city courts shall be sooner abolished as provided in this Constitution or by law, then the term of the clerk of any such court shall thereupon determine.

Sec. 9. The first election of the Governor and of all officers required by this Constitution, to be chosen by the qualified voters of the State at large, shall be held on the Tuesday after the first Monday in November, nineteen hundred and five, and their terms of office shall begin on the first day of February following their election. The present incumbents of said offices, or their successors, shall continue in office until the last-named day.

Sec. 10. The first election of members of the House of Delegates, and of all county and district officers, to be elected by the people under this Constitution, except as otherwise provided in this Schedule, shall be held on Tuesday after the first Monday in November, in the year nineteen hundred and three; and the terms of office of the several officers elected at that or any subsequent election shall begin on the first day of January, next after their election, except as otherwise provided in this Constitution or in this Schedule. And the terms of the office of the

sheriff, commonwealth's attorney, treasurer, commissioners of the revenue, superintendents of the poor, supervisors of the several counties, justices of the peace, and overseers of the poor, and of any incumbent of any other county or district office not abolished by this Constitution, nor herein specifically mentioned, now in office, or their successors, or whose terms of office shall begin on the first day of July, nineteen hundred and two, are continued until January the first, nineteen hundred and four.

The terms of the present members of the House of Delegates, and the terms of the senators now in office, or (in case of vacancies therein), their successors, representing the senatorial districts bearing even numbers, are extended until the second Wednesday in January, nineteen hundred and four; provided, that the term of the senator, now residing in the city of Richmond, who by the provisions of the apportionment act, approved April the second, nineteen hundred and two, is continued in office as one of the senators from the thirty-eighth senatorial district thereby created, be extended until the second Wednesday in January, nineteen hundred and six. The terms of the senators now in office, or (in case of vacancies therein), their successsors, representing the senatorial districts bearing odd numbers are extended until the second Wednesday in January, nineteen hundred and six.

In the senatorial districts bearing even numbers, there shall be elected, on the Tuesday after the first Monday in November, nineteen hundred and three, for a term of four years, to begin on the second Wednesday in January succeeding their election, members of the Senate to represent such districts; in the senatorial districts bearing odd numbers, and in the city of Richmond to fill the vacancy, which will, as above provided, occur on the second Wednesday in January, nineteen hundred and six, there shall be elected, on the Tuesday after the first Monday in November, nineteen hundred and five, for a term of two years, to begin on the second Wednesday in January succeeding their election, members of the Senate to represent such districts; and on the Tuesday after the first Monday in November, nineteen hundred and seven, there shall be elected, for the term of four years, to begin on the second Wednesday in January succeeding their election, a senator from each senatorial district in the State.

Sec. 11. All other state, county, and district officers, and their successors, who may be in office at the time this Constitution goes into effect, except the Auditor of Public Accounts, the Second Auditor, the Register of the Land Office, the Superintendent of Public Printing, the Commissioner of Labor and Industrial Statistics, Railroad Commissioner, nota-

ries public, the Adjutant-General, the Superintendent and the Surgeon of the Penitentiary, the Manager and the Surgeon of the State Prison Farm, the superintendents of the several state hospitals, and the school superintendents for counties and cities, and school trustees, shall, unless their respective offices be abolished, or unless otherwise provided by this Constitution or Schedule, hold their respective offices, and discharge the respective duties and exercise the respective powers thereof, until January the first, nineteen hundred and four. The terms of the present incumbents in the offices of Auditor of Public Accounts, Second Auditor, Register of the Land Office, Superintendent of Public Printing, and Commissioner of Labor and Industrial Statistics, shall continue until March the first, nineteen hundred and four. The term of the Railroad Commissioner shall end as soon as the State Corporation Commission shall be organized. Notaries public shall continue in office until their respective commissions shall expire. The term of the office of Adjutant-General shall expire March the first, nineteen hundred and six. The Superintendent and the Surgeon of the Penitentiary, the Manager and the Surgeon of the State Prison Farm, the superintendents of the several state hospitals, shall continue in office until their successors shall be appointed by the respective boards empowered under this Constitution to make the several appointments. The school superintendents for counties and cities shall remain in office for their respective terms, and until their successors are appointed. School trustees now in office, or their successors, shall remain in office until otherwise provided by law. Electoral boards with the powers conferred by existing laws, except the appointment of registrars, shall remain in office until March the first, nineteen hundred and four.

Sec. 12. The terms of the State Board of Education, the State Corporation Commission, and the Board of Agriculture and Immigration, the directors of public institutions and prisons, and of each state hospital, and the Commissioner of State Hospitals, to be first elected, or appointed, under this Constitution, shall begin on March the first, nineteen hundred and three. The board of any of the above-named departments and institutions as now constituted shall continue until the boards created under this Constitution for such departments and institutions respectively are duly organized. And the terms of the members of the Board of Fisheries are continued until March the first, nineteen hundred and six. The terms of the trustees or visitors of the state educational institutions, and other honorary appointments made by the Governor, are continued until otherwise provided by law.

Sec. 13. Charters of incorporation may, until the first day of April,

nineteen hundred and three, be granted or amended by the courts of the State in accordance with the laws in force when this Constitution goes into effect, unless the General Assembly shall sooner provide for the creation of corporations as required by this Constitution.

Sec. 14. The terms of all officers elected by the qualified voters of a city, and of their successors, in office at the time this Constitution goes into effect, or whose terms of office begin on the first day of July, nineteen hundred and two, except the terms of mayors, of members of city councils and of the clerks of city courts, are continued until January the first, nineteen hundred and six; and their successors shall be elected on the Tuesday after the first Monday in November, nineteen hundred and five. The terms of all city officers, not so elected, shall expire as provided in the charters of the several cities, or as may be provided by law.

Sec. 15. Until otherwise provided by law, the mayors of the several cities shall continue in office until September the first, nineteen hundred and four, and their successors shall be elected the second Tuesday in June, nineteen hundred and four. Until otherwise provided by law, the members of the several city councils shall continue in office for the terms prescribed in the charters of their respective cities, except that where their terms are prescribed as ending on the first day of July of any year, they shall be extended until the first day of September following.

Sec. 16. Vacancies in any office, the term of which is confirmed or extended by this Schedule, occurring during such term or extension thereof, shall be filled in the manner prescribed by law.

Sec. 17. All officers, whose terms of office are extended by this Schedule, required by law or municipal ordinance to give bond for the faithful discharge of the duties of their respective offices, shall, prior to the expiration of the terms for which they were respectively chosen, before the court or other authority before whom such officer was required by law or municipal ordinance to give such bond, enter into a new bond, in the same penalty and with such security as was prescribed by law or municipal ordinance in respect to his former bond, and with like conditions as therein prescribed, for the faithful discharge of the duties of his office for the extended term herein provided for, and until his successor shall have been duly chosen, and shall have qualified according to law. Upon failure to give such bond within the time above prescribed, the office shall, upon the expiration of the term for which the incumbent thereof was chosen, become vacant.

Sec. 18. In all elections held after this Constitution goes into effect,

the qualifications of electors shall be those required by Article Two of this Constitution.

Sec. 19. The General Assembly which convened on the first Wednesday in December, nineteen hundred and one, shall be called by the Governor to meet in session at the Capitol at twelve o'clock M., on Tuesday, the fifteenth day of July, nineteen hundred and two. It shall be vested with all the powers, charged with all the duties, and subject to all the limitations prescribed by this Constitution in reference to the General Assembly, except as to the limitation upon the period of its session, qualifications of members, and as to the time at which any of its acts shall take effect; but the ineligibility of the members thereof to be elected to any other office during their terms as members of the General Assembly shall be such as is imposed by this Constitution. The said General Assembly shall elect judges for all of the circuit courts provided for in this Constitution, and also of the corporation courts for Bristol, Radford, and Buena Vista, unless said city courts are sooner abolished.

Sec. 20. The said General Assembly shall enact such laws as may be deemed proper, including those necessary to put this Constitution into complete operation; to confirm those officers whose appointment is made by this Constitution subject to confirmation by the General Assembly or either house thereof; and to transact other proper business; and such session shall continue so long as may be necessary. The members shall receive for their services four dollars per day, for the time when the General Assembly is actually in session, including Sundays and recesses of not exceeding five days, and the mileage provided by law; the Speaker of the House of Delegates and President of the Senate shall each receive seven dollars per day for the same period and the mileage provided by law; and the other officers and employees shall receive such compensation for their services as the General Assembly may prescribe. Provision may be made for compensation at said rate of four dollars per day of members of legislative committees which may sit during any recess of said session.

Sec. 21. The compensation and duties of the Clerk of the House of Delegates and of the Clerk of the Senate shall continue as now fixed by law until the first of January, nineteen hundred and three, after which date their compensation shall be as prescribed by section Sixty-six of this Constitution.

Sec. 22. When the General Assembly convenes on the fifteenth day of July, nineteen hundred and two, its members and officers, before entering upon the discharge of their duties, shall severally take and

17879

subscribe the oath or affirmation prescribed by section Thirty-four of the Constitution. And not later than the twentieth day of July, nineteen hundred and two, the Governor and all other executive officers of the State, whose offices are at the seat of government, and all judges of courts of record, shall severally take and subscribe such oath or affirmation; and upon the failure of any such officer, executive or judicial, to take such oath by the day named, his office shall thereby become vacant. Such oaths or affirmations shall be taken and subscribed before any person authorized by existing laws to administer an oath. The Secretary of the Commonwealth shall cause to be printed the necessary blanks for carrying into effect this provision, and the said oaths and affirmations so taken and subscribed, except of the members and officers of the General Assembly, shall be returned to and filed in his office; and those taken by the members and officers of the General Assembly shall be preserved in the records of the respective houses.

Sec. 23. The official copy of the Constitution and Schedule, and of any ordinance adopted by the Convention, shall, as soon as they shall be enrolled, be signed by the President and attested by the Secretary of the Convention, and the President will thereupon cause the same to be delivered to the Secretary of the Commonwealth, who will file and preserve the same securely, among the archives of the State in his custody.

The Secretary of the Commonwealth will cause the Constitution, Schedule, and said ordinances to be transcribed in a book to be provided for the purpose and safely kept in his office.

The Secretary of the Convention will immediately upon the adoption of this Schedule, deliver a certified copy of the Constitution and Schedule, and of said ordinances, to the Governor of the Commonwealth.

Sec. 24. The Governor is authorized and directed to immediately issue his proclamation announcing that this revised and amended Constitution has been ordained by the people of Virginia, assembled in Convention, through their representatives, as the Constitution for the government of the people of the State, and will go into effect as such, subject to the provisions of the Schedule annexed thereto, on the tenth day of July, nineteen hundred and two, at noon, and calling upon all the people of Virginia to render their true and loyal support to the same, as the organic law of the Commonwealth.

Sec. 25. This Constitution shall, except as is otherwise provided in the Schedule, go into effect on the tenth day of July, nineteen hundred and two, at noon.

This Schedule shall take effect from its passage.

INDEX TO CONSTITUTION.

Sec.

A.

Agriculture and Immigration, Department of, where maintained, how controlled, 143
Board of, how composed, term of office, 143
Powers and duties of, to be prescribed by law, 144
Commissioner of, term of office, how elected, powers and duties, 145
President of Board of, *ex-officio* member of Board of Visitors of Virginia Polytechnic Institute, 146
Apportionments of State into senate and house districts, 43
Into congressional districts, 55
Appropriations, to churches, etc., and certain institutions forbidden, 67
Army, standing, should be avoided, 13
Suffrage privilege of veterans, 19
Attorney-General, Governor may require opinion of, 74
Member of Board of Education, 130
How elected; duties, compensation; how removable, 107
Auditor of Public Accounts, how elected and term of office; duties and powers to be prescribed by law, 82
To charge Treasurer with unpaid poll-taxes, 38
Auditing Committee, how appointed, duties of, 68

B.

Bail, excessive, ought not to be required, 9
Application for, General Assembly shall provide by whom, and in what manner, shall be heard, 109
Ballot, elections by people shall be by, 27
Voters may erase and substitute names on, 28
Secrecy of, maintained, 27, 37
General Assembly shall provide form of, 28
Form and contents of, 28
Voter may erase any name and substitute another, 28
Ballot-box kept in view at all elections, not opened in secret, 27
Bill of Rights, 1-17
Bill, may originate in either house, how enacted into laws, 50
Amendment to, how concurred in, 50
How conference report on, adopted, 50
How printing and reading dispensed with, 50
When recorded vote necessary to pass, 50
Presiding officer must sign when passed and enrolled, after title read, and fact entered on journal, 50
Presented to Governor before becoming a law, 76
How passed over veto, 76
Veto of items of appropriation bill, effect of, 76
Not returned or signed by Governor becomes a law in five days; exception, 76
Board of Public Works shall cease to exist on organization of corporation commission, 156*b*
Bond, officers, etc., handling money to give bond, 85
Additional security may be required, 113
None required as condition of appeal to Supreme Court of Appeals; when *supersedeas* bond may be required, 88
Bureau of Labor and Statistics, General Assembly to have power to establish, 86

C.

Churches, not to be chartered; General Assembly may secure title to church property, 59
Appropriations to, forbidden, 67
Changes in Constitution, 196-197

17880

	Sec.
Circuit Court shall appoint electoral board,	31
Shall hear and decide applications to correct list of unpaid poll-taxes,	38
How and when judges elected; their qualifications,	96
Number of terms to be prescribed by law; no separate court held for cities of second class, etc.,	97
Concurrent jurisdiction with Corporation Court when,	98
Cities and Towns, General Assembly may grant by general law powers of local legislation to council,	65
General Assembly not forbidden to authorize appropriations by, to charitable institutions,	67
Cities, how divided into first and second classes,	98
Courts of cities of each class,	98
When Corporation Court in city of second class shall cease to exist, effect of same,	98
May increase salaries of judges; Salaries of judges paid how,	103
Words "incorporated communities" relate only to,	116
Definition of city and of town,	116
Charters of towns having city charters previously not repealed; abolition by them of Corporation Court not prevented,	116
General Assembly to pass general laws for organization and government of,	117
Previous charters may be retained, but are amended to conform to constitution,	117
Streets, alleys, or public grounds of, cannot be used by certain corporations without previous consent of city or town authorities,	124
Commonwealth's Attorney of,	119
Restrictions on sale of property or rights of,	125
Restrictions on granting of franchises; method and provisions in grants of same; General Assembly may impose further restrictions,	125
General Assembly shall provide by general law for extension and contraction of corporate limits,	126
Limitation of bonded indebtedness of; what to be excepted in ascertaining bonded indebtedness,	127
Assessment for municipal taxation to be the same as for state taxation,	128
May make appropriations to manual and industrial schools,	141
Cannot grant its credit to any person or corporation; may, however, perfect subscription to stock of railroad company,	185
City Council, General Assembly may grant by general law powers of local legislation to,	65
Composed of two branches; powers and terms of office; how elected; in cities under 10,000 may consist of one branch; member ineligible to office in gift of council; powers in changing wards and reapportioning representation in council; when *mandamus* lies,	121
When elected; beginning of term; election not to occur at same time as that of other elective officers,	122
Ordinances of, to be presented to Mayor; how passed over veto of Mayor; objections of Mayor with veto to be recorded in journal; ordinance becomes operative if not returned by Mayor in five days; exception,	123
What ordinances require recorded vote; effect of veto upon,	123
Clerks of election, how appointed,	31
Clerk of Circuit or Corporation Court to keep roll of registered voters,	19
Clerk of Circuit Court shall certify and deliver copies of list of unpaid poll-taxes, and record sheriff's return,	38
Shall keep lists for inspection, etc.,	38
File and preserve original list,	38
Furnish copy to election judges and Auditor of Public Accounts,	38
Clerk of Corporation Court shall certify and deliver to sheriff copies of lists of unpaid poll-taxes and record sheriff's return,	38
Shall keep lists for inspection, etc.,	38
File and preserve original list,	38
Furnish copy to election judges and Auditor of Public Accounts,	38
Clerk of House of Delegates shall be Keeper of the Rolls,	66
Clerks of General Assembly, General Assembly shall prescribe number and compensation of,	66
Clerk of county, how elected,	110

Sec.

Terms of office, 112
General Assembly may confer certain jurisdiction upon, 101
Clerks of courts in cities, how elected, term of office; shall perform other duties required by law, 118
Only one clerk of courts in city of less than 30,000 inhabitants, 118
In cities, term of office to begin coincidently with that of judge, 122
Commissions shall be in name of Commonwealth attested by Governor, 75
Committee on Special, Private and Local Legislation, duties of, 51
Commissioner of the revenue of county, how elected or appointed; term of office, number, duties and compensation to be provided by law, 110
Of city, how elected, duties and compensation to be provided by law, term of office, 119
Commonwealth has no appeal in criminal case, except for violation of revenue law, 8, 88
What debts State may contract, 184
Credit of State not to be granted to person or corporation; State shall not engage in works of internal improvement except public roads, or assume indebtedness of or lend credit to county, city or town, 185
Commonwealth's Attorney of county, how elected, 110
Of city, how elected, duties, 119
Congressional districts, General Assembly to apportion State, 55
Constitution, oath to support, who shall take, 34
How future changes to be made, 196
Constitutional Convention, how to be called, 197
Corporations, 153-167
Use of streets, etc., by, must be by consent of corporate authorities, 124
Definition of terms used in article on, 153
Creation of, extension or amendment of charters of; how provided for; how charters may be repealed, 154
Provision shall be made by general laws for surrender of charter of, 154
General Assembly shall not regulate affairs of, or give any rights, etc., to, by special act, 154
Domestic and foreign, shall pay certain fees; penalties for failure, 157
Shall be considered, when hereafter accepting any amendment or extension of its charter, if chartered in this State, as surrendering exemption of freedom from taxation, non-repealable features of charter and exclusive rights, 158
Exercise of eminent domain and police power shall never be abridged as to corporations, 159
Long and short distance transportation rates, 160
Transportation or transmission company shall not give free transportation, or rebate in charges for same to any officer other than members of corporation commission; penalty, 161
Foreign, restrictions and provisions as to, 163
Right of Commonwealth to control and regulate certain corporations never surrendered or abridged, 164
Right of railroad, to parallel; reception and transmission of passengers and freight by connecting roads; right of General Assembly to prevent building of railroad parallel to Richmond, Fredericksburg and Potomac, 166
Issue of stock and bonds by, to be regulated by General Assembly; statement to be filed with corporation commission; penalties to be provided and how enforced, 167
How property of railroad and canal companies taxed, 176
Franchise tax to be paid by railroad and canal companies, 177
How franchise tax ascertained, 178
Annual report of railroad and canal companies to corporation commission; when taxes to be paid; taxes to be lien on property of company, 179
May appeal from ascertainment of sections 176 and 178; proceedings on appeal, 180
Corporation Commission, State, composition of; how appointed; term of office; vacancies, how filled; when members to enter upon duties and when not; who ineligible; at least one member to have qualifications prescribed for judge of Supreme Court of

Sec.

Appeals; how impeached or removed; employees of; powers, rights and duties; General Assembly may establish bureaus; sessions of commission public; record shall be kept; two shall be a quorum; salaries of commissioners; General Assembly may provide for their election by the people, 155
Powers and duties of, 156
Concerning notice to corporations against whom action is to be taken, 156*b*
Has powers of court of record in certain matters, 156*c*
Penalty on corporation refusing to obey order of commission, 156*c*
How action of commission appealed from; Attorney-General to represent it on appeal, 156*d*
Supreme Court of Appeals alone to have power to review, or enjoin or in any way interfere with action of commission, 156*d*
Action of commission not suspended pending appeal until suspending bond shall have been executed, 156*e*
Corporation to keep accounts of excess charges pending appeal, and excess returned, 156*e*
Proceedings on appeal; facts, etc., to be certified to appellate court; jurisdiction of appellate court, 156*f*
Appellate court, on reversing order of commission, shall enter such order as commission should have entered; commission may make new rates based on new circumstances pending appeal, such orders not to be retroactive, 156*g*
Proceedings by persons in courts against corporations not affected by fine of commission; action of commission not to be questioned in such proceedings; no case based upon or involving order of commission shall be heard or disposed of pending appeal from such order, 156*h*
Reports of, what may be recommended therein, 156*i*
Upon organization of, Board of Public Works and office of Railroad Commissioner shall cease to exist; papers of same transferred to commission, 156*k*
Amendments to act creating, 156*l*

Sec.

Transportation companies shall carry members of, free, 155
Action as to rates of transportation companies from junction points, mileage and other special tickets, 160
Shall assess for taxation property of railroad and canal companies, 176, 179
Shall ascertain franchise tax, how, 178
Proceedings on appeal from ascertainment in sections 176 and 178, 180
Corporation courts, shall appoint electoral boards, 31
Shall hear and decide applications to correct list of unpaid poll-taxes, 38
One in each city of the first class, 98
When in city of second class, how abolished, 98
Ceases to exist when, in city of second class, 98
Counties, formation and division of, 61
General Assembly may grant by general law powers of local legislation to supervisors, 65
General Assembly not forbidden to authorize appropriations by, to charitable institutions, 67
Officers of, 110
Not responsible for acts of sheriff, 114
Cannot lend credit to person or corporation; when may subscribe to stock of railroad company, 185
County surveyor, to be appointed as prescribed by law, 110
Courts of Land Registration, General Assembly may establish, 100

D.

Departments, legislative, executive and judicial, to be separate and distinct, 5, 39
Disabilities, legal, persons excluded from voting, 23
Power of General Assembly to impose, 36
Power of General Assembly to remove, as to duelling, 57
Division of powers, 39
Duelling, disabilities arising from, how removed, 23, 57

E.

Education, State Board of, how composed, 130
Superintendent of Public Instruction *ex-officio* president of, 131

	Sec.
Duties of board,	132
School divisions, how constituted; county or city shall not be divided in formation of,	132
School superintendents, how appointed; term of office; may be removed for cause,	132
School fund managed by Board of Education,	132
Board to have management of State Library,	132
School district, each magisterial district shall constitute a,	133
School trustees, number, how selected; term of office,	133
Manual and industrial schools, cities and towns may make appropriations to,	141
Compulsory, General Assembly may provide for,	138
When free text-books provided,	139
Limitation to appropriations to educational institutions; exceptions,	141
Educational institutions, appointment of boards of visitors or trustees of; term of office,	142
Educational qualification of voters; roll of persons thus qualified to be kept; appeal under section,	19
Elections, ought to be free,	6
By the people; who may vote,	18, 19, 20, 21
Shall be by ballot,	27
Person entitled to vote at next, may register,	26
Privileges of voters during,	29
General Assembly to enact laws governing,	36, 56
Date of, for members of General Assembly,	41-42
For county officers, when held,	112
Mayor and council not elected and terms not to commence at same time with those of other city officers,	122
Elective franchise and qualifications for office,	18-38
Electoral Board, constitution and appointment and terms of,	31
Shall appoint judges, clerks and registrars of election,	31
Who ineligible,	31
Emoluments, no man entitled to exclusive, or privileges from community except for public services,	4
Employer's liability,	162
Equality and natural rights of all men,	1
Evidence, in criminal proceedings no man required to give, against himself,	8
Executive department,	69-86

F.

Fellow-servant, doctrine of, abolished to extent stated,	162
Fines, excessive, ought not to be imposed,	9
Franchises, of cities and towns, limitations and restrictions of,	125

G.

General Assembly, may provide for trial of offences by magistrate,	8
May provide for juries of less than twelve,	8, 11
Shall provide for annual registration of voters, appeals from, and correction of same and transfers of voters,	25
Shall provide form of ballot,	28
May prescribe property qualification for voting in local elections; how such action taken,	30
Members of, shall swear to support Constitution of United States and of Virginia,	34
Shall enact laws governing elections,	36
May provide for use of voting machines,	37
May prescribe further evidence of payment of poll-tax,	38
Shall consist of Senate and House of Representatives,	40
When reapportionments of State into senate and house districts shall be made,	43
Proceeding in case of emergency bills,	53
Who are ineligible for election to,	44
Removal of member from district shall vacate his office,	44
Salaries of members to be fixed by,	45, 46
Member not to be appointed or elected during his term to any office of profit except by election of the people,	45
Time of meeting and duration of sessions; extensions,	46
Neither house to adjourn more than three days nor to another place without consent of the other,	46
Quorum; power of smaller number,	46

	Sec.
Each house to select its officers, make rules, direct writs of election for vacancies occurring during session, judge of election of members, and punish or expel members,	47
Members exempt from arrest when,	48
Freedom of speech and debate in,	48
Each house to keep and publish a journal, yeas and nays entered on request of one-fifth,	49
How laws and amendments shall be enacted,	50
When recorded vote necessary,	50-76
Signing of bills by presiding officer of each house,	50
Committee on special, private and local legislation, duties of,	51
Shall apportion State for Congressional districts,	55
May declare when any office vacant where no provision made in Constitution,	56
Shall prescribe manner of conducting elections, returns thereof, of determining contested elections and of filling vacancies in cases not specially provided for in Constitution,	56
May remove political disabilities as to duelling,	57
Shall not pass certain laws,	58
Shall not incorporate church or religious denomination, but may secure title to church property,	59
May form and divide counties, when,	61
May enact local option or dispensary laws or other laws controlling liquor traffic,	62
Shall confer on courts power to grant divorces, to change names of persons, to direct sale of estates of infants, and may regulate punishment by courts for contempt,	63
What local, special or private legislation prohibited,	63
May enact general laws, however, in such cases; limitation of amendments of such general laws,	64
May confer by general law powers of local legislation on supervisors and councils,	65
Shall prescribe number and compensation of its employees,	66
Appropriations to churches and institutions forbidden; exception,	67
Shall appoint Auditing Committee,	68
To provide checks and balances for officers,	84
Shall decide tie and contested elections for Governor,	70
When Governor may convene,	73
Governor shall communicate condition of State to,	73
Proceedings to pass bill over veto of Governor,	76
May require record and papers, etc., from Secretary of the Commonwealth,	80
To prescribe by law duties of State Treasurer and Auditor,	81, 82
To fix salaries of officers of Executive Department,	83
To fix and regulate bonds of officers,	85
Shall have power to establish Bureau of Labor and Statistics,	86
Jurisdiction of courts to be regulated by law,	87
May change jurisdiction of Supreme Court after 1910 in matters merely pecuniary,	88
Duties, compensation and tenure of office of officers of Supreme Court of Appeals to be prescribed by law,	92
Places of sessions of Supreme Court of Appeals to be fixed by law,	93
Number of terms of circuit courts to be prescribed by law,	97
May provide for a Special Court of Appeals, how constituted,	89
Shall have management of Law Library,	132
To elect judges of Court of Appeals by joint vote,	91
May provide for Special Court of Appeals,	89
May rearrange judicial districts, how,	95
Shall elect circuit judges,	96
Shall elect city court judges,	99
Salaries of judges to be fixed by law,	102
May provide additional courts for cities,	98
Shall choose judges of city courts, how elected,	99
May establish courts of land registration,	100
May confer certain jurisdiction on clerks of courts,	101
May remove judges from office for cause,	104

	Sec.
To provide for appointment, or election, and jurisdiction of justices of the peace,	108
Shall provide by whom and in what manner applications for bail shall be heard,	109
Compensation of commissioners of the revenue of counties shall be prescribed by law,	110
May change magisterial districts by law,	111
Other duties of clerks of city courts to be provided by law,	118
Same provision as to Commonwealth's Attorney of city,	119
May designate authorities to appoint city officers, and authorize Mayor to remove members and officers of police and fire departments,	120
May permit council to consist of one branch in city of under 10,000,	121
May change the time of election of all city officers, except Mayor and council; must not be elected and commence to serve at same time with other officers,	122
Shall provide for examination of books, etc., of county officers handling public funds,	115
Shall be governed by United States census in determining population of cities and towns,	116
Shall enact general laws for organization and government of cities and towns; how special act therefor passed,	117
Shall provide by general laws for extension or contraction of corporate limits of cities and towns,	126
Shall maintain efficient system of public schools,	129
May impose further restrictions on granting of franchises by or selling or leasing property of cities and towns,	125
Compensation of Superintendent of Public Instruction to be prescribed by law,	131
Shall prescribe rules and regulations for government of State Library,	132
School trustees to be selected in manner and for term prescribed by law,	133
Shall set apart certain sums for Literary Fund,	134
Application of certain moneys for school fund,	135
May establish certain schools,	137
May provide for compulsory education of children,	138
May in discretion continue appropriation to College of William and Mary,	141
Boards of visitors or trustees of educational institutions to be appointed in manner prescribed by law,	142
Powers and duties of Board of Agriculture and Immigration to be prescribed by law,	144
Same as to Commissioner of Agriculture and Immigration,	145
General Board of Directors of Insane Hospitals subject to such regulations as General Assembly may prescribe,	150
Duties and bond of Commissioner of State Hospitals for the Insane to be prescribed by law,	152
May amend act creating corporation commission upon recommendation of commission,	156½
Shall prescribe certain fees to be paid by corporations, and penalties for failure,	157
Members shall not accept free transportation or any rebate in rates for same; penalty,	161
Shall enact laws preventing trusts inimical to public welfare,	165
Shall enact general laws concerning issue of bonds and stock by corporations,	167
Shall provide for reassessments of property,	171, 172
Shall levy state capitation tax, how applied; further capitation tax may be authorized to counties, cities and towns,	173
May from time to time determine natural oyster beds, etc.,	175
Shall provide and maintain sinking fund,	187
May levy special tax for pensions,	189
Shall prescribe manner of setting aside homestead exemption,	192
Prohibited from passing laws staying the collection of debts,	194
Government, instituted for common benefit,	3
What is best,	3
When majority of community has right to reform,	3
Should be uniform; separate government from that of Virginia not to be established in State,	14
Qualities necessary to preservation of,	15

17883

Sec.

Governor may issue writs of election to fill vacancies in General Assembly occurring during recess, 47
Term of, 69
How elected; mode of proceeding in contested elections for, to be decided by law, 70
Qualifications for election, 71
Residence and salary, 72
Duties and powers of, 73, 74
Shall attest commissions and grants, 75
Duties in regard to bills passed by General Assembly, 76
Veto of items of appropriation bills, effect of, 76
Governor shall commission judges, 102
Member of Board of Education, 130
To appoint Board of Agriculture and Immigration, subject to confirmation of Senate, 143
To appoint Directors of Penitentiary, subject to confirmation of Senate, 148
To appoint Directors of State Insane Hospitals, subject to confirmation of Senate, 149
To appoint Commissioner of State Insane Hospitals, with confirmation of Senate, 152
To appoint Corporation Commission, with confirmation of General Assembly, 155
Grants shall be in name of Commonwealth, attested by Governor, 75

H.

Habeas corpus, writ of, when suspended, 58
Heirs of property, 195
Homestead and other exemptions, 190-195
Homestead exemption, householder or head of family entitled to, not exceeding $2,000; to what debts exemption does not extend, 190
In what property exemption shall not be claimed, 191
Manner and conditions on which exemption may be set aside to be prescribed by General Assembly, 192
Homestead exemptions heretofore claimed not invalidated by this constitution; householder or head of family at time this constitution goes into effect may select old or new exemptions, 193

Sec.

Hospitals for the Insane, State, board of directors for each; number of members; how appointed; powers and term of office, 149
General board for; how composed; powers of, 150
Superintendents of; how appointed and removed; term of office; may appoint employees, 151
Officers of; term of office; how appointed, 151
Commissioner of; how appointed; term of office, powers, duties and compensation, 152
House of Delegates, number of members; how and when elected, 42
Qualifications of a delegate, 44
To choose Speaker, 47

I.

Impeachments by House of Delegates to be tried by Senate under oath or affirmation; limitation of sentence; party convicted liable to indictment, 54
Indictments to conclude "against the peace and dignity of the Commonwealth," 106

J.

Jeopardy, no man to be put in, twice for same offence, 8
Judge, office of, not to be hereditary, 4
Judges, one for each city court of record, chosen by General Assembly; qualifications, residence; how elected; may be required or authorized to hold other courts, 99
Circuit, may be required or authorized to hold certain other courts, 97
Privileges of corporation judge of city of less than 5,000 inhabitants, 99
Shall be commissioned by Governor; salaries to be fixed by law; terms of office; elections to fill vacancies to be for unexpired term, 102
Limit of salaries; how paid; cities may increase salaries, 103
How removed from office, 104
Of Court of Appeals, Circuit Court or city court of record cannot practice law nor hold other office; exception, 105
Of election; how appointed and who not eligible, 31

Sec.

Of election, shall be furnished with list of persons whose poll-taxes are unpaid, 38
Judiciary Department, 87-109
Judiciary Circuits of State, number and composition, 94
May be rearranged, how, 95
Jury may be dispensed with in criminal prosecutions, when, 8
General Assembly may provide for juries of less than twelve, 8, 11
Justices of the peace, appointment or election, and jurisdiction of, to be provided for by General Assembly, 108

K.

Keeper of the Rolls, Clerk of House of Delegates shall be, without compensation, 66

L.

Laws, power of suspending, without consent of representatives of people injurious, and ought not to be exercised, 7
Tax laws must state tax specifically, 50
What laws require recorded vote, 50
How enacted, 50
No law to embrace more than one object; how amended, 52
Title must state object, 52
When to take effect, 53
What local, special, or private, prohibited, 63
Special laws not to surrender right of taxing corporations, except as provided, 64
Private corporations, associations, or persons not excepted from operation of general law, 64
Legislative Department, 40-68
Legislator, office of, not to be hereditary, 4
Library (see State Library).
Lieutenant-Governor, term of office, 77
Duties, compensation, 78-79
Liquor laws, General Assembly to have right to enact, 62
Literary Fund, what shall be set apart as, 134
Interest to be applied to schools, 135
Lottery, authorization of, by law forbidden, and buying, selling, or transferring of lottery tickets forbidden, 60

Sec.

M.

Magistrate, office of, not to be hereditary, 4
General Assembly may provide for trial of offences by, 8
Magisterial districts to remain as before constitution until changed by law; limitation as to size, 111
Shall constitute separate school district, 132
Military subordinate to civil power, 13
Militia proper defence of State, 13
Governor commander-in-chief of militia, powers of Governor in reference to, 73
Mayor, how elected, term of office, duties; power to investigate acts of officials, and examine under oath; evidence so given not to be used against officials in criminal proceedings; shall have power to suspend city officials and remove them when authorized by General Assembly for misconduct, etc.; no removal without notice and hearing; how removal appealed from, 120
When elected, beginning of term, election not to occur at same time as that of other elective officers, 122
Effect of veto of, of items of appropriation ordinance, 123

N.

Navy, suffrage privilege of veterans, 19
Notary public, who eligible, 32

O.

Offence, no man to be put twice in jeopardy for same, 8
Officers, who eligible, 32
When terms begin, 33
Shall serve until successors elected and qualified, 33
Shall swear to support Constitution of United States and of Virginia, 34
What officers ineligible for election to General Assembly, 44
In what cases bond required, 85
If not otherwise provided, how elected or appointed, 120
When elected, beginning of term, 122
County, when elected, commencement and duration of terms of office, 112

	Sec.
No person to hold more than one county office,	113
Of city, titles, duties, etc.,	120
Mayor and council, when elected,	122
Of insane hospitals, how appointed and removed,	151
Organization and government of counties,	110-115
Of cities and towns,	116-128
Ordinances of city council,	123
Oysters, natural beds, rocks and shoals shall be held in trust for people,	175

P.

Penitentiary, branches and farms,	147
Directors of, how appointed, number, duties, powers, and terms of office,	148
Sperintendent of, how appointed, powers, duties, term of office; how and for what removed,	148
Surgeons of, how appointed, term of office; how and for what removed,	148
Pensions, General Assembly may levy special tax for; appropriation for,	189
People, power vested in and derived from,	2
Poll-tax, payment of, requisite for registration and voting,	19, 20
When not requisite,	22
When enforced by legal process,	22
Further evidence of payment of, may be prescribed,	38
List of unpaid, how corrected,	38
Treasurer to file list of persons who have not paid; what list to contain, how same to be posted,	38
Power vested in and derived from the people,	2
President of the Senate, Lieutenant-Governor shall be,	79
Press, freedom of,	12, 58
Primary election, who may vote,	35
General Assembly shall enact proper laws for governing,	36
Privileges, no man entitled to exclusive emoluments or, except for public services,	4
Process of law, no person to be deprived of property without,	11
Property, no person to be deprived of, without due process of law,	11
In controversies respecting, trial by jury preferable,	11
Private, not to be taken for public use without compensation,	58
Sale of corporate,	125
Property qualification of voters,	19
General Assembly may provide, in local elections,	30
May be prescribed by General Assembly,	31
Prosecutions for crimes and offences regulated,	8
Criminal, defendant has right to demand cause and nature of accusation,	8
Punishments, cruel and unusual, ought not to be inflicted,	9

R.

Railroad Commissioner, office of, shall cease to exist on organization of corporation commission,	156k
Recorded vote, shall be had on request of one-fifth of members of General Assembly,	49
What laws require,	50
Registrations, when held,	19
Who may register, previous to January 1, 1904,	19
Who may register, after January 1, 1904,	20
Roll to be sworn and certified to by officers and filed in clerk's office of Circuit Court or Corporation Court,	19
Persons registered not required to register again unless they have ceased to be residents of State or become disqualified,	19
Person denied registration may appeal,	19
General Assembly to provide for annual,	25
Registration, General Assembly shall provide for annual registration and transfers, and appeal from and correction of,	25
Person entitled to vote at next election admitted to,	26
Registrars of election, how appointed and who not eligible,	31
Religion, freedom of,	16, 58
Residence (see Voters and Registrations).	
Revenue, appeal allowed Commonwealth in criminal prosecutions for violation of revenue law,	8
Rights, Bill of,	1-17
Limits only those expressed therein,	17

S.

Sailors, when legal residence not gained,	24

	Sec.
Salaries, of Governor,	72
Of officers of Executive Department to be fixed by law,	83
Of judges; how paid,	103
Schools, system of public, to be maintained,	129
What money to be applied to; how apportioned,	135
Local taxes for; how raised, apportioned and expended,	136
When free text-books provided,	139
White and colored children not to be taught in same school,	140
Limitation to appropriations to,	141
School districts (see Education).	
School divisions (see Education).	
School superintendents (see Education).	
School trustees (see Education.)	
Secretary of the Commonwealth, election and duties; disposition of fees collected by,	81
Senate, number of members, how and when elected,	41
Qualifications of a senator,	44
When it may choose president *pro tem.*,	47
Sergeant of city, how elected, term of office, duties,	120
Services, public, no man entitled to exclusive or separate emoluments or privileges except for,	4
Sheriff, how elected,	110
County not responsible for acts of,	114
To post copies of list of unpaid poll-taxes, and make return of same,	38
Sinking Fund, how provided and maintained; every law creating a debt or authorizing loan shall provide for a sinking fund for payment of same,	187
Slaves, children of, when they may inherit property,	195
Speaker of the House of Delegates to be elected by the House,	47
Special Court of Appeals, General Assembly may provide for, how constituted,	89
Speech, freedom of,	12, 58
Soldiers, when legal residence not gained,	24
State Library, how managed; who shall appoint libarian and employees of,	132
State Treasurer, election; duties to be prescribed by law,	81
"Stay laws," General Assembly prohibited from passing,	194
Streets, use of, by corporations,	124
Suffrage, who should have,	6
Superintendent of the Poor to be appointed as prescribed by law,	110
Superintendent of Public Instruction, qualifications, how and when elected; term of office; vacancy in office, how filled; duties and compensation,	131
Supervisors, Board of, how elected, time of meetings, duties,	111
General Assembly may grant by general law powers of local legislation to,	65
Supreme Court of Appeals to consist of five judges, three of whom may hold court,	88
Jurisdiction; what cases appealable,	88
Assent of three judges required to declare a law unconstitutional,	88
Opinions to be written and preserved,	90
How judges chosen, qualifications, terms of office,	91
Officers of, how appointed; duties, terms and compensation to be prescribed by law,	92
Places of session to be prescribed by law,	93
Has exclusive jurisdiction of appeals from corporation commission, or to interfere with or enjoin same,	156*d*

T.

Taxation founded on consent,	6
Law creating tax must state same specifically,	50
Right of State to tax corporations or corporate property not to be surrendered or suspended by any general law except as authorized by Article XIII.; no private corporation, association or individual exempted from any general law,	64
Assessment for municipal, to be same as for State taxation,	128
How school tax levied and applied,	135, 136
And Finance,	168-189
Shall be general and uniform,	168
Assessments of property to be at fair market value; General Assembly may allow cities and towns to impose lower rates for a period of years on certain	

Sec.

land than on other; General Assembly may segregate property into classes after January 1, 1913, 169

Income, license and franchise taxes may be levied; when franchise tax levied, or whole capital of corporation taxed, shares not to be further taxed, 170

What taxes for street or other improvements may be levied by cities and towns on abutting property owners, 170

Reassessments of real property for, 171

Assessment of coal and other mineral land, 172

State capitation tax, how levied and applied; not a lien superior to poor debtor's law; additional capitation tax may be allowed counties, cities and towns; how same applied, 173

Statute of limitations not to run against State's claim for taxes; failure to assess not to defeat subsequent assessment and collection of taxes unless property purchased for value without notice, when taxes may be collected from date of purchase, 174

Of real estate of railroad and canal companies, 176

Franchise tax of railroad and canal companies, 177, 178

When sections 176-180 apply; General Assembly to have power to change system if inoperative, 181

How shares of banks and trust companies taxed. 182

What property shall be exempt from taxation, 183

Taxes to be collected by proper officers and paid into state treasury, 186

No greater amount of, shall be levied than necessary for expenses or to pay indebtedness of State, 188

Rate of state taxation, 189

General Assembly may levy special tax for pensions, 189

Towns (see Cities and Towns).

Treasurer of county or city shall file with clerk of Circuit or Corporation Court list of persons who have not paid poll-tax; what such list to contain, 38

Of county, how elected, terms, qualifications, 110

Sec.

Of city, how elected, terms, qualications, 120

Treasury, how money to be paid out of, 186

Trial by jury, defendant in criminal prosecutions has right to speedy, 8

Trusts, General Assembly shall enact laws preventing, inimical to public welfare, 165

V.

Veterans of army or navy, suffrage privilege of veterans and sons of veterans, 19

Of civil war need not pay poll-tax in order to vote, 22

Viva voce vote in representative bodies, 27

Vote in Legislative bodies shall be *viva voce*, 27

Voters, qualifications of, 18, 19, 20, 21

Male citizen, twenty-one years of age, who has been resident of State two years, of county, city or town one year, of precinct thirty days next preceding election, has been registered and has paid poll-tax, entitled to vote for all officers elective by the people, 18

Removal from one precinct to another in same county, city or town shall not deprive person of right to vote in precinct from which he has moved until expiration of thirty days from removal, 18

Not disqualified for non-payment of poll-tax if they have served in army or navy, etc., 22

What persons excluded from voting, 23

When residence as to suffrage shall not be deemed gained, 24

Privileges of, during elections, 29

May erase and substitute names on ballot, 28

Qualified voters eligible to any office, 32

Who may vote in primary elections, 35

Voting machines, General Assembly may provide for use of, 37

Virginia Polytechnic Institute, president to be *ex-officio* member of Board of Agriculture and Immigration, 143

President of Board of Agriculture and Immigration *ex-officio* member of Board of Visitors of Virginia Polytechnic Institute, 146

W.

	Sec.
Warrants, when grievous and oppressive, and ought not to be granted,	10
Writs to run in name of "Commonwealth of Virginia," and to be attested by clerk of court,	106

INDEX TO SCHEDULE.

A.

	Sec.
Actions, writs and causes of action, rights, etc., to continue except as modified by Constitution. Jurisdiction of courts to remain unchanged to February 1, 1904. Transfer of causes, etc.,	3
Adjutant-General,	11
Auditor of Public Accounts,	11

B.

Board of Agriculture and Immigration,	12
Board of Education, State,	12
Board of Fisheries,	12
Bond,	17

C.

Charters,	13
Circuit Courts,	7
City council, members of,	15
City courts, terms of judges,	7
Privileges of certain judges to practice law,	7
City officers,	14, 15
Clerks of courts,	8
Clerk of House of Delegates,	21
Clerk of Senate,	21
Commonwealth's Attorney,	10
Commissioner of Labor and Industrial Statistics,	11
Commissioner of the Revenue,	10
Commissioner of State Hospitals,	12
Constitution, oath to support, who shall take, preservation of blanks,	22
Preservation of official copy,	23
Takes effect when,	25
To be transcribed in a book and kept in office of Secretary of Commonwealth,	23
Certified copy to be delivered to Governor,	23
Corporation Commission, State,	12
County courts,	7
Privileges of judges to practice law,	7

D.

Directors of Public Institutions and Prisons,	12
Of State Hospitals,	12

E.

Electoral Boards,	11
Escheats,	4

F.

Fines,	4
Forfeitures,	4

G.

General Assembly, extra session of,	19
Powers, duties and compensation,	20
To take oath to Constitution,	22
Governor, certified copy of Constitution to be delivered by Secretary of Commonwealth to,	23
Election, term, etc.,	9
To take oath to Constitution,	22
Proclamation of, what same shall contain,	24

H.

House of Delegates, election and beginning of term of members,	10
Terms of present members,	10

J.

Justices of the peace,	10
Judges to take oath to support Constitution,	22

L.

Laws, common and statute, to remain in force, not repugnant to or repealed by Constitution,	1

M.

Manager of State Prison Farm,	11
Mayor,	15

N.

Notaries public,	11

17886
117

O.

Sec.

Obligations to Commonwealth, cities, towns, 5
Officers, State, when elected, beginning of term, end of term of incumbent, 9, 10, 11, 12
To take oath to support Constitution, 22
Ordinances of Convention to have same force and effect as if parts of Constitution, 2
Overseers of the Poor, 10

P.

Penalties, 4

Q.

Qualifications of voters, 18

R.

Railroad Commissioner, 11
Register of Land Office, 11

S.

Schedule, takes effect when, 25
School superintendents, 11
School trustees, 11
Second Auditor, 11
Secretary of the Commonwealth to provide blanks for oath to support Constitution, 22
To have Constitution transcribed in a book and safely kept in his office, 23
Deliver a certified copy of Constitution and Schedule to Governor, 23
Senators, 10
Sheriff, 10
Superintendent of the Penitentiary, 11
Superintendent of the Poor, 10
Superintendent of Public Printing, 11
Superintendents of State Hospitals, 11
Supervisors, 10
Supreme Court of Appeals, 6
Surgeon of the Penitentiary, 11
Surgeon of State Prison Farm, 11

T.

Taxes, fines, penalties, forfeitures and escheats, 4
Trustees of State Educational Institutions, 12
Treasurer, term of present, 10

V.

Vacancies in office to be filled as prescribed by law, 16
Visitors of State Educational Institutions, 12

AN ORDINANCE

To provide for the registration of voters under this Constitution, and prior to the year nineteen hundred and four (1904).

It is ordained as follows: Until the first day of January, nineteen hundred and four, all voters shall be registered in accordance with the requirements of this ordinance, as follows:

Section 1. Registration shall be conducted in each magisterial district of every county, and in each ward of every city, by a board of registrars, composed of three competent citizens, resident in such district or ward, appointed as hereinafter provided, each of whom shall qualify by signing and filing with the clerk of the county court of their respective counties, or the corporation court of their respective cities, as the case may be, a paper signifying their acceptance of their appointment, and who shall hold office until the first day of January, nineteen hundred and four; except that in the city of Bristol there shall be only one board, composed of three competent citizens thereof.

The board shall organize by electing one of its members chairman and another secretary of the board.

If any person appointed refuse or fail to qualify by the first day of August, nineteen hundred and two, or to serve, or if a vacancy occur in such board, the judge of the county court of the county, or of the corporation court of the city, shall by appointment supply the place or fill such vacancy; and such appointees shall qualify in the same manner as those appointed by this ordinance.

For attendance upon the sessions of the board, each member shall receive a compensation of two dollars per day. While actually engaged in the discharge of his official duties as to registration, each member of any such board shall have the authority and powers of conservators of the peace as defined by laws existing at the time this ordinance becomes operative.

Sec. 2. Prior to the fifteenth day of October, nineteen hundred and two, and again prior to the fifteenth day of October, nineteen hundred and three, there shall be a general registration in each of the counties, cities, and towns of the State; and each board of registrars for each district and ward, prior to each of the foregoing dates, shall convene and sit at some place and time to be designated by it in each precinct in its district or ward, at least one day, from eight o'clock in the morning to sunset in the counties, and from twelve o'clock noon to nine o'clock P. M. in cities and towns, and at such other places within the district or ward as may be convenient and necessary to complete the registration of the

voters. Each board may determine whether it will sit consecutively for the period hereafter stated, or whether it will sit from time to time for such number of days within said period as it may determine. At the registration to be held prior to the fifteenth day of October, nineteen hundred and two, the aggregate number of days in which any board shall sit within any one district or ward shall not exceed fifteen days; and at the registration to be had in the year nineteen hundred and three, the aggregate number of days in which any board shall sit within any one district or ward shall not exceed ten days. The judge of the county court of a county, or of a corporation court of a city, may, on the motion of the board, extend the time for either of such registrations for a further period or time to be determined by such judge, and shall fix the days for such registration.

The board shall give at least twenty days' notice of the time and place or places at which it will open books for registration at any precinct, by bills posted at five or more public places in the precinct, and also by weekly advertisement for two successive weeks in a newspaper, if one be published in the county or city, and in such other manner as it may deem expedient, and where the books are opened for more than one precinct, or for the whole district or ward, then like notice of the time and place shall be posted in five or more public places within each precinct, for which such registration is held, and advertised by publication as aforesaid.

Sec. 3. The board shall register all persons who apply for registration, entitled to register under this Constitution, prior to January the first, nineteen hundred and four, and none others; and it shall have power to administer oaths to, and examine under oath, any applicants and witnesses, and to receive evidence and hear testimony touching qualifications for registration.

The act of a majority of its members shall be the act of the board; and a majority of the members shall constitute a quorum for the transaction of all business.

Sec. 4. The board shall record in suitable books, hereinafter provided for, in alphabetical order, the names of all persons registered, the date of birth and registration, their occupation and residence. Separate books, in duplicate, for white and colored voters shall be kept for each precinct; one of each of which shall, after the completion of each registration, be forwarded by the chairman of the board to the clerk of the county court of the county, or of the corporation court of the city, to be copied in a proper book and preserved in his office.

Until January the first, nineteen hundred and four, the board shall have the custody and keeping of the other duplicate of said registration

books; but, a reasonable time before the elections to be held in nineteen hundred and two and nineteen hundred and three, the books for each precinct shall be delivered to the judges appointed at such precinct to conduct said elections, and they, a reasonable time after said elections, shall return the books to said board.

After the first day of January, nineteen hundred and four, the board shall deliver the registration books to the proper registration officers designated by law.

At the completion of every registration conducted by it, each member of the board shall sign, and certify the accuracy of the same on oath, upon the registration books.

Sec. 5. Until the first day of January, nineteen hundred and four, if any person so registered shall move to another precinct, he shall be entitled to register therein on the permanent roll, upon a transfer issued by the secretary of the board, before which he last registered; and a note of such transfer shall be made by the said secretary upon the permanent roll in his possession.

Sec. 6. Any person who, upon his examination, shall wilfully make a false statement of any material fact affecting his qualifications as a voter, shall be guilty of perjury, and, upon conviction thereof, shall forfeit for life his right to vote.

Sec. 7. Any person denied registration shall have the right to appeal, without payment of writ tax or giving security for costs, to the circuit court of the county or to the corporation court of the city, in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing to have his right to register determined, containing a statement of the facts proved before said board; to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

Upon the filing of such petition, the clerk of the court shall at once give notice to the Commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor the petitioner.

Sec. 8. The Secretary of the Commonwealth shall have prepared suitable books for the registration of voters and forward them to the clerk of the county court of each county, and to the clerk of the corporation

court of each city, to be by them distributed to the several boards of registrars of their respective counties and cities.

The books shall be so spaced and ruled as to provide for the convenient entry of the number and name of the voter, in alphabetical order, his age, occupation, residence, length of time he has resided in the State and county and precinct, and, if a naturalized citizen, the date of his naturalization papers and the court by which issued, if known; and, if registered as a voter exempt from the payment of a poll tax as a prerequisite to the right to vote, under section twenty-two of the Constitution, for the statement of that fact.

It shall be the duty of the Secretary of the Commonwealth, before the twentieth day of July, nineteen hundred and two, to forward to each of the persons chosen by the Convention as members of the several boards of registration, a certificate showing that such person has been so chosen, which certificate shall be evidence of the facts therein stated.

Upon the receipt of such certificate, the member of the registration board named therein shall signify his acceptance in writing to the clerk of his county, or the clerk of the hustings or corporation court of his city, upon blanks to be furnished by the Secretary of the Commonwealth.

The Secretary of the Commonwealth shall, with said certificate, send to each member of said board a copy of the Constitution and of this registration ordinance.

Sec. 9. On or before the first day of September, nineteen hundred and two, the treasurer of each county and city shall furnish to the board of registrars of each district or ward of his county or city, a certified list containing the names of all persons within such district or ward who, for the year nineteen hundred and one, have paid as much as one dollar in state tax for property owned by and assessed against them; and, on or before the first day of September, nineteen hundred and three, the said treasurers shall furnish to said boards a similar list of those who, for the year nineteen hundred and two, have paid as much as one dollar in state tax for property owned by and assessed against them.

Sec. 10. The books and blank forms to be prepared by the Secretary of the Commonwealth shall be provided at the expense of the State; but all other costs and charges of registration, including postage, stationery, and publication of notices, shall be defrayed by the counties and cities in which such registration is held.

Sec. 11. To conduct the registration provided for in this ordinance, the persons whose names appear below shall be, and they are hereby appointed, members of the board of registrars for the several magisterial districts and wards of the several counties and cities, as follows:

REGISTRATION BOARDS

ACCOMAC COUNTY.

Pungoteague Magisterial District,—William T. Mason, H. E. Wescott, William M. Turlington.

Lee Magisterial District,—Thomas C. Kellam, Robert P. Coleburn, Wilbur J. Milliner.

Metompkin Magisterial District,—Joseph R. Riggs, J. Harry Rew, Albert J. Rew.

Atlantic Magisterial District,—S. J. Revell, A. Clinton Matthews, James E. Anderton.

Islands Magisterial District,—John A. M. Wheelton, William J. Matthews, A. Frank Matthews.

ALBEMARLE COUNTY.

Scottsville Magisterial District,—James S. Harris, James Starke, T. E. Wilhoit.

Samuel Miller Magisterial District,—A. S. Watson, F. H. Via, C. E. Gay.

Whitehall Magisterial District,—Charles L. Wayland, Thomas White, William Z. Catterton.

Ivy Magisterial District,—S. A. Calhoun, Peter W. Garland, Henry G. White.

Charlottesville Magisterial District,—Bartlett Bolling, John H. Barksdale, M. R. Taylor.

Rivanna Magisterial District,—H. E. Magruder, William H. Bowcock, W. A. Marshall.

ALEXANDRIA COUNTY.

Washington Magisterial District,—William N. Febrey, George Ott Wunder, R. C. L. Moncure.

Arlington Magisterial District,—Curtis B. Graham, William Ball, W. W. Douglass.

Jefferson Magisterial District,—John W. Varney, Frank Hume, John W. Slater.

ALLEGHANY COUNTY.

Boiling Spring District,—C. B. Hunter, D. J. Callaghan, J. H. McDevitt.

Covington District,—W. A. Rinehart, H. A. Faulconer, W. E. Allen.

Clifton District,—George W. Warren, H. E. Meeks, Robert Robinson.

AMELIA COUNTY.

Leigh Magisterial District,—John T. Southall, C. C. Farley, George A. Wiley.

Giles Magisterial District,—W. E. Griffith, Bradley S. Johnson, N. W. de Krafft.

Jackson Magisterial District,—M. J. Oliver, E. N. Hamner, R. W. Blanton.

AMHERST COUNTY.

Amherst Courthouse Magisterial District,—C. B. Christian, B. R. Harrison, G. Frank Powell.

Temperance Magisterial District,—T. C. Payne, W. T. Watson, Ed. Lee Fulcher.

Pedlar Magisterial District,—T. B. Wood, H. R. Crist, M. B. Kyle.

Elon Magisterial District,—I. P. Whitehead, P. C. Cabell, W. E. Powell.

APPOMATTOX COUNTY.

South Side Magisterial District,—R. F. Burke, F. L. Martin, A. H. Howerton.
Clover Hill Magisterial District,—W. P. Gills, E. P. Sears, J. W. Clark.
Stonewall Magisterial District,—T. J. Stratton, C. H. Coleman, N. R. Featherstone.

AUGUSTA COUNTY.

South River Magisterial District,—C. Benton Coiner, John T. Smith, Samuel B. Harper.
North River Magisterial District,—E. G. Crist, M. Bruce Whitmore, C. H. Fulton.
Beverly Manor Magisterial District,—W. P. Gay, W. A. McComb, C. F. Neel.
Riverheads Magisterial District,—J. Marshall McClure, S. A. D. McKee, G. Lewis Clemmer.
Middle River Magisterial District,—James T. Kerr, Samuel H. McCue, John S. Richey.
Pastures Magisterial District,—James W. Seig, D. F. Hoover, John W. Montgomery.

BATH COUNTY.

Warm Springs Magisterial District,—S. W. Anderson, William M. McAllister, J. W. Harper.
Cedar Creek Magisterial District,—William G. Payne, C. W. Richardson, George H. Chaplin.
Crawford Mill Magisterial District,—Jasper N. Bradshaw, Robert M. McClintic, George W. Wallace.
Millboro Magisterial District,—John S. Dickinson, H. R. Lowman, Stonewall Jackson Armentrout.

BEDFORD COUNTY.

Central Magisterial District,—John M. Early, S. R. Watson, W. R. Abbot, Jr.
Lisbon Magisterial District,—F. C. Otey, H. L. Caldwell, Gordon Cofer.
Chamblissburg Magisterial District,—J. W. Nimmo, William H. Powers, Joseph P. Wright.
Staunton Magisterial District,—Pinckney Anthony, John W. Hubbard, C. E. Carter.
Otter Magisterial District,—Henan T. Witt, Thomas G. Read, William H. Wright.
Bellevue Magisterial District,—T. T. Patterson, Thomas W. White, J. P. Cannada.
Forest Magisterial District,—Amandus N. Walker, Jr., A. W. Scott, Wellington Ogden.
Charlemont Magisterial District,—William P. Burks, J. T. Noell, R. H. Parks.

BLAND COUNTY.

Sharon Magisterial District,—W. B. Allen, Wythe G. Waddle, Luther Scott.
Sedden Magisterial District,—R. C. Green, L. F. Grayson, Thomas Dunn.
Mechanicsburg Magisterial District,—W. H. G. Harmon, Meek Tickle, John C. Mustard.
Rocky Gap Magisterial District,—Frazier Stowers, John E. Shrader, George Stowers.

REGISTRATION BOARDS

BOTETOURT COUNTY.

Amsterdam Magisterial District,—Marshall Frantz, Thomas Gross, J. F. Gardner.

Fincastle Magisterial District,—C. W. Woltz, C. W. Rudisill, M. S. Cahoon.

Buchanan Magisterial District,—W. M. Brewbaker, U. H. Hyde, Charles L. Williamson.

BRUNSWICK COUNTY.

Powellton Magisterial District,—Ira W. Mitchell, S. P. Carpenter, A. S. Rawlings.

Meherrin Magisterial District,—P. H. Rawlings, G. B. Harris, N. S. Jones.

Red Oak Magisterial District,—John Haskins, U. S. Samford, S. J. Wallace.

Sturgeon Magisterial District,—D. C. Thomas, W. W. Doyle, James A. Browder.

Totaro Magisterial District,—W. T. Sledge, W. O. Lashley, S. E. Williams.

BUCHANAN COUNTY.

Grundy Magisterial District,—Alex. Runyons, W. P. McGlothin, John A. McClanahan.

Garden Magisterial District,—William B. McNiel, W. W. Horton, Emmett Combs.

Rock Lick Magisterial District,—Joseph L. Elswick, John W. Lee, Miles Elswick.

BUCKINGHAM COUNTY.

Mayesville Magisterial District,—J. T. Rogers, L. C. Moseley, P. A. Grigg.

Curdsville Magisterial District,—Mathew J. Cox, J. T. Bransford, J. W. Farley.

Slate River Magisterial District,—M. L. A. Moseley, Robert B. Agee, G. W. Patterson.

Marshall Magisterial District,—Robert H. Miller, T. R. Shaw, Julian Smith.

Francisco Magisterial District,—W. C. Trent, J. O. Morris, E. C. Wooldridge.

James River Magisterial District,—J. E. Carter, W. P. Ellis, Price Glover.

CAMPBELL COUNTY.

Rustburg Magisterial District,—Frank Nelson, Adam Clement, G. A. Coleman.

Seneca Magisterial District,—Mark Anthony, R. C. Hawkins, W. T. Oaks.

Falling River Magisterial District,—L. C. Asher, Thomas Whately, R. E. Musgrove.

Otter River Magisterial District,—Thomas Dillard, Clark M. Kabler, W. W. Driscoll.

Brookville Magisterial District,—H. C. Featherstone, N. J. Floyd, J. T. Falwell.

CAROLINE COUNTY.

Madison Magisterial District,—D. J. Waller, G. Allensworth, W. M. Oliver.

Reedy Church Magisterial District,—Clarence Bowers, Arch Samuel, T. R. Campbell.

Bowling Green Magisterial District,—S. W. Broaddus, Eugene Pitts, J. H. Martin.

Port Royal Magisterial District,—J. B. Washington, C. B. Conway, R. C. Thornton.

CARROLL COUNTY.

Pine Creek Magisterial District,—James Dalton, George W. Hyatt, S. A. Smith.

Laurel Fork Magisterial District,—C. M. Marshall, W. L. Utt, Franklin Branscome.

Fancy Gap Magisterial District,—M. T. C. Mitchell, Friel Hawks, John A. Jones.

Piper Gap Magisterial District,—Thomas J. Huffman, E. P. Givens, James W. Edwards, Jr.

Sulphur Springs Magisterial District,—Adonijah Lineberry, W. K. Early, Norman Gwynn.

CHARLES CITY COUNTY.

Harrison Magisterial District,—L. A. Marston, W. D. Barnett, Allen Walker.

Tyler Magisterial District,—Thomas W. Wilcox, Thomas L. Christian, John R. Waddill.

Chickahominy Magisterial District,—E. H. Slater, Stanley Parsons, W. L. Wilkinson.

CHARLOTTE COUNTY.

Madison Magisterial District,—John D. Shepperson, Walter S. Pugh, G. W. Berkley.

Walton Magisterial District,—James C. Watkins, Lee W. Morton, J. H. Priddy.

Bacon Magisterial District,—Berkley D. Adams, Stith Barksdale, Charles M. Broocks.

Roanoke Magisterial District,—Frank B. Watkins, Henry W. Harvey, Henry C. Marshall.

Midway Magisterial District,—W. G. Cabannis, J. W. Gilchrist, T. A. Wilkes.

CHESTERFIELD COUNTY.

Dale Magisterial District,—John Penn Taylor, E. A. Swineford, A. J. Gill.

Clover Hill Magisterial District,—Julian A. Salle, Wilfred Ira Robertson, Lucius A. Sims.

Midlothian Magisterial District,—Selwyn Hancock, John A. Lester, C. G. Whitworth.

Matoaca Magisterial District,—W. A. Blankingship, R. E. Eanes, Waverly S. Ivey.

Manchester Magisterial District,—B. P. Owen, Jr., Daniel Bliley, L. W. Cheatham.

Bermuda Magisterial District,—Charles N. Friend, D. M. Walker, Samuel L. Perdue.

CLARKE COUNTY.

Greenway Magisterial District,—George C. Meade, Turner Russell, M. H. Reardon.

Chapel Magisterial District,—A. V. Neville, Samuel J. Wiley, Charles Jones.

Battletown Magisterial District,—George C. Shepherd, Thomas Elsea, J. H. Powers.

Long Marsh Magisterial District,—B. F. Foley, F. H. Pierce, William McDonald.

CRAIG COUNTY.

Newcastle Magisterial District,—Samuel L. Ruble, William A. Charlton, James H. Caldwell.

Alleghany Magisterial District,—Daniel L. Huffman, Robert A. Eakin, W. P. B. Lipes.

Simmonsville Magisterial District,—Albert Troutt, A. McHenry Caldwell, Miles L. Givens.

CULPEPER COUNTY.

Stevensburg Magisterial District,—Leon Nalle, John M. Shackelford, D. Wright Kelly.

Cedar Mountain Magisterial District,—Daniel A. Slaughter, James W. Garnett, W. Alexander Taliaferro.

Catalpa Magisterial District,—Lewis P. Nelson, Jr., John R. Duncan, Alex-K. Wood.

Salem Magisterial District,—John M. Lewis, Frederick E. Porter, Thomas C. Howard.

Jefferson Magisterial District,—W. G. Crigler, F. L. Campbell, Robert R. Duncan.

CUMBERLAND COUNTY.

Randolph Magisterial District,—B. W. L. Blanton, A. J. Smith, Thornton Holman.

Madison Magisterial District,—Paul McRae, W. L. Guthrie, Jr., J. L. Foster.

Hamilton Magisterial District,—E. J. Harrison, W. J. Jennings, C. R. Saunderson.

DICKINSON COUNTY.

Clintwood Magisterial District,—John W. Kerr, N. B. French, W. L. Brown.

Willis Magisterial District,—J. M. Artrip, S. H. Senter, George Davis.

Ervington Magisterial District,—R. W. Ervin, H. K. Hillman, David Smith, Sr.

Kenady Magisterial District,—Ira Boggs, John W. Hill, Robert Lee Mullins.

Sand Lick Magisterial District,—T. K. Colly, R. D. Sutherland, K. L. Colly.

DINWIDDIE COUNTY.

Rowanty Magisterial District,—John Y. Harris, James W. Boisseau, William F. Baugh.

Namozine Magisterial District,—J. C. Smith, Andrew Meade, H. C. Lovett.

Darvilles Magisterial District,—E. S. Hobbs, E. W. Hudgins, J. A. Frayser.

Sapony Magisterial District,—E. C. Powell, C. E. Abernathy, J. P. Atkinson.

ELIZABETH CITY COUNTY.

Chesapeake Magisterial District,—H. H. Holt, LeGrande Donohoe, David Johnson.

Hampton Magisterial District,—S. Gordon Cumming, F. W. Sheild, J. Wilton Hope.

Wythe Magisterial District,—Sidney J. Dudley, T. H. Parramore, Scott Wood.

ESSEX COUNTY.

Occupacia Magisterial District,—W. A. Gresham, Henry Waring, B. B. Spindle.

Central Magisterial District,—R. C. McDonald, B. C. Rennolds, C. S. Smith.
Rappahannock Magisterial District.—R. G. Carnthorn, R. H. Seward, R. H. Dillard.

FAIRFAX COUNTY.

Falls Church Magisterial District,—George Auld, James M. Mason, George A. Brunner.
Providence Magisterial District,—W. P. Moncure, R. E. Berry, John R. Stuart.
Dranesville Magisterial District.—J. H. Hurst, George W. Gunnell, Robert L. Harrison.
Centerville Magisterial District,—James P. Machen, Sr., J. R. M. Gheen, John M. Ford.
Mount Vernon Magisterial District,—R. C. Triplett, R. W. Gaillard, Frank Reid.
Lee Magisterial District,—Henry D. Rice, Frank Wooster, John W. Raney.

FAUQUIER COUNTY.

Centre Magisterial District,—L. C. Andrews, W. F. Follin, R. C. Murphy.
Scott Magisterial District,—H. H. Hulfish, H. S. Haines, W. A. Rucker.
Marshall Magisterial District,—R. I. Russell, John M. Ashby, Ogden Wood.
Lee Magisterial District,—W. S. Herroll, T. T. Jones, John K. Taliaferro.
Cedar Run Magisterial District,—W. O. Bower, S. M. Lomax, H. P. Waite.

FLOYD COUNTY.

Courthouse Magisterial District,—William Pendleton, L. W. Hylton, Charles Thomas.
Burks Fork Magisterial District,—C. F. Page, W. H. Willis, J. E. Burwell.
Indian Valley Magisterial District,—H. C. Hall, Henry Strong, J. L. Kenley.
Alum Ridge Magisterial District,—H. H. Earles, H. M. Boothe, Wade Thompson.
Little River Magisterial District,—W. H. Harman, T. L. Robinson, B. Dickerson.
Locust Grove Magisterial District,—W. L. Reed, J. H. Shockey, T. H. Walters.

FLUVANNA COUNTY.

Columbia Magisterial District,—James McC. Miller, John W. Holland, R. C. Bowles.
Palmyra Magisterial District,—J. Flint Omohundro, J. Walter Shiflett, George Minor Winn.
Fork Union Magisterial District,—R. J. Snead, A. S. Burgess, Virgil Anderson.
Cunningham Magisterial District,—B. W. Taylor, W. J. Kent, M. G. Davis.

FRANKLIN COUNTY.

Rocky Mount Magisterial District,—W. T. McGhee, C. P. Preston, W. D. Martin.
Snow Creek Magisterial District,—T. J. Belcher, Thomas D. Frith, W. P. F. Lee.
Union Hall Magisterial District,—D. H. Berger, Charles Hodges, W. D. Haynes.
Gills Creek Magisterial District,—A. W. Hutcherson, J. H. Ferguson, L. M. Wright.
Boubrook Magisterial District,—R. A. Lovelace, M. D. Martin, John H. Moore.

Little Creek Magisterial District,—Tazewell Helms, J. W. Angell, Leslie Bell.
Maggodee Magisterial District,—J. O. Abshire, C. W. Mills, Berkley Price.
Blackwater Magisterial District,—E. C. Akers, C. T. Jamison, William E. Price.
Long Branch Magisterial District,—Hughes D. Cannady, S. T. Thomas, W. A. Thompson, Jr.
Brown Hill Magisterial District,—S. J. Prillaman, C. L. Ross, D. A. Nicholson.

FREDERICK COUNTY.

Shawnee Magisterial District,—John M. Silver, David Carpenter, R. J. Wigginton.
Opequan Magisterial District,—Briscoe Shull, W. T. Birmingham, Hugh Funk.
Back Creek Magisterial District,—T. W. Morrison, Meredith Anderson, J. W. Himmelwright.
Gainsboro Magisterial District,—R. L. Omps, Jonah Tavenner, John W. Harper.
Stonewall Magisterial District,—Clark Purcell, A. Pine, William Timberlake.

GILES COUNTY.

Pearisburg Magisterial District,—E. S. Dennis, S. W. Preston, Charles D. French.
Pembroke Magisterial District,—Albert Angel, Harve Phlegar, Arthur Snidow.
Walker's Creek Magisterial District,—S. B. Shannon, S. R. Crockett, T. S. Taylor.
Newport Magisterial District,—G. T. Porterfield, Albert Price, John S. Dowdy.

GLOUCESTER COUNTY.

Petsworth Magisterial District,—T. F. Perry, W. C. Stubbs, J. D. Stubbs.
Ware Magisterial District,—W. A. Robins, A. M. Pointer, Rex Hinkle.
Abingdon Magisterial District,—J. T. Mills, H. L. Bridges, J. W. Pointer.

GOOCHLAND COUNTY.

Dover Magisterial District,—Henry S. Holland, J. V. Bowles, Leroy D. Ellis.
Licking Hole Magisterial District,—David B. Harris, Julian Kean, H. H. Hoye.
Byrd Magisterial District,—James M. Trice, Robert Fisher, Arthur W. James.

GRAYSON COUNTY.

Elk Creek Magisterial District,—W. M. Warren, F. H. Ward, E. Scott Hale.
Wilson Magisterial District,—J. A. Phipps, A. N. Hash, A. W. Wagg.
Old Town Magisterial District,—Andrew Carico, And. J. Higgins, W. R. Duffhey.

GREENE COUNTY.

Standardsville Magisterial District,—E. D. Davis, B. P. Runkle, George W. Shelton.
Ruckersville Magisterial District,—R. B. Simpson, J. D. Yowell, John E. Douglas.
Monroe Magisterial District,—Thomas J. Chapman, John D. Early, J. H. Williams.

GREENESVILLE COUNTY.

Belfield Magisterial District,—R. H. Short, Henry Maclin, J. E. Everet.
Hicksford Magisterial District,—J. H. Robinson, J. J. Garner, J. F. Powell
Zion Magisterial District.—Harry Taylor, J. H. Lifsey, Ernest Lashly.

HALIFAX COUNTY.

Banister Magisterial District,—S. J. Slate, J. M. Carrington, W. Holt Edmunds.
Meadsville Magisterial District,—Armstead Barksdale, Jr., J. Carter Glass, T. E. Dickerson.
Mt. Carmel Magisterial District,—A. E. Wilkins, A. A. Owen, J. H. Brandon.
Red Bank Magisterial District,—W. W. Tuck, John T. Torian, R. A. Singleton.
Birch Creek Magisterial District,—C. D. Barksdale, E. B. Wimbish, S. T. A. Kent.
Roanoke Magisterial District,—C. A. Gregory, Howell C. Lacy, Tucker C. Watkins.
Staunton Magisterial District,—John W. Cousins, E. Y. Wimbish, T. F. DeJarnette.
Black Walnut Magisterial District,—W. C. Slate, G. T. Crowder, C. M. Jordon.

HANOVER COUNTY.

Beaver Dam Magisterial District,—William D. Wickham, John Campbell, H. C. Redd.
Ashland Magisterial District,—M. P. Howard, W. C. Taylor, H. L. Quarles.
Henry Magisterial District,—F. H. Holladay, Thomas R. Puller, F. S. Beale.

HENRICO COUNTY.

Varina Magisterial District,—John A. Archer, A. L. Cornwell, Thomas Guy.
Tuckahoe Magisterial District,—H. B. Haley, L. P. Michaels, John T. Nuckols.
Fairfield Magisterial District,—Thomas J. Carter, W. T. Crawford, Hugh D. Smith.
Brookland Magisterial District,—Marshall F. Burton, Harvie D. Goddin, J. W. Penick.

HENRY COUNTY.

Martinsville Magisterial District,—C. B. Bryant, H. W. Jamerson, W. H. Hairston.
Ridgeway Magisterial District,—J. B. C. Ambrose, L. A. Starling, A. B. Poindexter.
Horse Pasture Magisterial District,—W. B. Clark, S. W. Marshall, D. M. Fry.
Leatherwood Magisterial District,—T. G. Minter, J. M. Eanes, M. E. Minter.
Reed Creek Magisterial District,—Thomas R. Winn, George W. Davis, Sr., John W. Miles.
Irisburg Magisterial District,—H. M. Land, D. F. Dunlop, W. G. Gravely.

HIGHLAND COUNTY.

Stonewall Magisterial District,—John O. Armstrong, W. R. Siron, H. T. Bradshaw.
Monterey Magisterial District,—S. B. Seig, John A. Whitelaw, Don. Sullenberger.
Blue Grass Magisterial District,—John K. Kramer, E. W. Armstrong, Samuel A. Gilmore.

ISLE OF WIGHT COUNTY.

Windsor Magisterial District,—R. B. White, Jack Saunders, C. F. Joyner.
Newport Magisterial District,—J. E. White, John W. Gray, George H. Parker.
Hardy Magisterial District,—Turner S. Reynolds, W. D. Gwaltney, William E. Howle.

JAMES CITY COUNTY.

Jamestown Magisterial District,—Jacob Vaiden, William Lee, B. S. Scott, Jr.
Stonehouse Magisterial District,—R. E. Taylor, D. W. Marston, George W. Bacon.
Powhatan Magisterial District,—H. W. Wynne, Joseph Bush, F. C. Stewart.

KING GEORGE COUNTY.

Rappahannock Magisterial District,—H. Potts, Henry Hunter, Allen Smith.
Potomac Magisterial District,—H. T. Garnett, R. W. Coakley, Dangerfield Ashton.
Shiloh Magisterial District,—J. G. Taliaferro, C. H. Purks, Alexander Pratt.

KING AND QUEEN COUNTY.

Newton Magisterial District,—R. D. Bates, J. R. Fleet, W. S. Hill.
Stevensville Magisterial District,—I. F. Drain, R. D. Allen, A. H. Eubank.
Buena Vista Magisterial District,—Llewellyn Courtney, H. W. Bland, J. R. F. Vaughan.

KING WILLIAM COUNTY.

West Point Magisterial District,—Henry Corr, I. H. Richards, I. B. Green.
Acquinton Magisterial District,—William Edwards, John H. Haw, A. B. Willis.
Mangohick Magisterial District,—Joseph H. Gwathmey, M. D. Sizer, John R. Redd.

LANCASTER COUNTY.

White Stone Magisterial District,—Joseph B. Cralle, William M. Kirk, Frank G. Newbill.
Mantua Magisterial District,—William J. Barker, Herbert P. Hall, Robert O. Norris, Jr.
White Chapel Magisterial District,—William H. Jesse, James P. Saunders, William A. Saunders.

LEE COUNTY.

Rose Hill Magisterial District,—James H. Humphreys, T. S. Snavely, John P. Speak.
White Shoals Magisterial District,—John F. Headen, Josephus Grabeel, James B. Smith.
Jonesville Magisterial District,—C. P. Brown, J. P. Albert, Charles J. Robinett.
Rocky Station Magisterial District,—James M. Durham, A. K. McClure, James B. Kirk.
Yokum Station Magisterial District,—J. B. Wolfe, J. K. P. Barron, James Smith.

LOUDOUN COUNTY.

Broad Run Magisterial District,—W. L. Ferguson, Converse Bridges, J. W. Johnson.

Jefferson Magisterial District,—F. J. Beans, J. O. Potts, G. G. Gregg.

Mount Gilead Magisterial District,—W. A. McFarland, J. R. Marshall, J. B. Vansickler.

Mercer Magisterial District,—W. R. Keelen, John D. Moore, Henry Saffe.

Lovettsville Magisterial District,—H. T. Potterfield, C. W. Everhart, Hampton Virts.

Leesburg Magisterial District,—C. F. Daily, J. E. Kidwell, William Gaines.

LOUISA COUNTY.

Green Springs Magisterial District,—William McComb, William Overton, J. W. Flanagan.

Louisa Courthouse Magisterial District,—N. T. Garth, Romulus Poore, Frederick Kean.

Cuckoo Magisterial District,—William Kean, Robert N. Harris, T. E. Beckham.

Jackson Magisterial District,—R. A. Trice, Anthony Goodwin, George F. Harrison.

LUNENBURG COUNTY.

Loch Leven Magisterial District,—Wellington Featherston, S. J. Hite, Walter Neblett.

Columbian Grove Magisterial District,—R. Lee Thomas, W. H. Hawthorne, S. H. Love.

Brown's Store Magisterial District,—Theodore Orgain, Garland Bailey, L. J. Hamlin.

Lewiston Magisterial District,—J. T. Waddill, Lula Gee, Austin Fowlkes.

Rehoboth Magisterial District,—W. A. Bigger, S. A. Harding, E. J. Gregory.

Pleasant Grove Magisterial District,—W. N. Love, W. Y. Fowlkes, J. A. Shackleton.

MADISON COUNTY.

Robertson Magisterial District,—Charles O. Simms, J. N. Clore, J. L. Fray.

Rapidan Magisterial District,—C. E. Kite, John W. Price, W. L. Payne.

Locust Dale Magisterial District,—Lester Hill, C. D. Twyman, John B. Graves.

MATHEWS COUNTY.

Chesapeake Magisterial District,—F. W. Jarvis, J. A. Weston, Alexander James.

Westville Magisterial District,—John J. Burke, R. L. McCready, B. M. Diggs.

Piankitank Magisterial District,—Stephen Adams, Charles S. Williams, Frank R. Landon.

MECKLENBURG COUNTY.

Boydton Magisterial District,—James L. Toon, H. L. Turpin, R. R. Jeffreys.

Blue Stone Magisterial District,—M. Garnette Russell, T. Y. Allen, Henry A. Walker.

Chase City Magisterial District,—Lucius Gregory, J. Jordan Mason, T. E. Roberts.

Buckhorn Magisterial District,—H. L. Petty, S. B. Johnson, James P. Reekes.

South Hill Magisterial District,—John E. Mathews, Robert J. Northington, B. B. Smith.

Flat Creek Magisterial District,—W. Andrew Elam, W. R. Baskervill, Richard A. Elam.

Palmer's Springs Magisterial District,—S. L. Graham; E. L. Haskins, George L. Hayes.

Clarksville Magisterial District,—Lewis B. Gilliland, Jr., R. W. Elam, J. O. Rainey.

MIDDLESEX COUNTY.

Jamaica Magisterial District,—W. E. Kain, George R. Northam, Burke Richardson.

Saluda Magisterial District,—John R. Ferneyhough, Herbert L. Smither, R. B. Segar.

Pine Top Magisterial District,—E. W. Bristow, F. E. Topping, James Grennels.

MONTGOMERY COUNTY.

Alleghany Magisterial District,—E. H. Taylor, Edward D. Colhoun, D. C. Lancaster.

Auburn Magisterial District,—P. H. Kinser, Warren L. Carper, John Sarles.

Blacksburg Magisterial District,—Byrd Anderson, J. R. K. Cowan, Howe Brown.

Christiansburg Magisterial District,—Jesse A. Miller, R. D. M. Charlton, G. W. Fagg.

NANSEMOND COUNTY.

Sleepy Hole Magisterial District,—James Arthur, John S. Bond, Reginald Wright.

Chuckatuck Magisterial District,—James P. Rives, C. F. Pinner, A. W. Ballard.

Holy Neck Magisterial District,—E. B. Britt, J. K. P. Daughtrey, John F. Rawls.

Cypress Magisterial District,—M. F. Lloyd, A. C. Milteer, Fairlee Brinkly.

NELSON COUNTY.

Lovingston Magisterial District,—John L. Snead, T. B. M. Perkins, Coleman J. Cabell.

Massie's Mill Magisterial District,—George W. Whitehead, John I. Loving, William H. Hight.

Rockfish Magisterial District,—Hudson Martin, T. L. Kent, Jr., W. N. West.

NEW KENT COUNTY.

Black Creek Magisterial District,—R. W. Hollins, J. R. Dobson, Gregory W. Fisher.

St. Peter's Magisterial District,—J. P. Smithie, George Sweet, George Mountcastle.

Cumberland Magisterial District,—R. D. Cook, Norwood Apperson, H. C. Taylor.

Ware Creek Magisterial District,—Sylvanus Goddin, Robert Boswell, William F. Martin.

NORFOLK COUNTY.

Washington Magisterial District,—M. C. Keeling, J. P. Jackson, Edmund Christian.

Butt's Road Magisterial District,—George S. Fentress, W. B. Keeling, L. F. Cason.

Pleasant Grove Magisterial District,—John T. West, W. C. Wood, H. W. West.

Deep Creek Magisterial District,—S. W. Gary, John G. McCoy, W. W. Harris.

Western Branch Magisterial District,—George Lindsay, J. W. Bidgood, C. W. Coleman.

Tanner's Creek Magisterial District,—E. W. Savage, J. F. Coleman, Edward Holland.

NORTHAMPTON COUNTY.

Franktown Magisterial District,—J. Alma Smith, George H. Thomas, Thomas T. Upshur.

Eastville Magisterial District,—G. Frederick Floyd, Philip A. Fitzhugh, Benjamin Thomas.

Capeville Magisterial District,—George B. Taylor, William D. Williams, Jesse S. Nottingham.

NORTHUMBERLAND COUNTY.

Lottsburg Magisterial District,—Giles F. Eubank, Slater Cowart, Charles U. Warner.

Heathsville Magisterial District,—J. A. Rice, W. D. Cockrell, Samuel E. Headley.

Fairfields Magisterial District,—J. W. Tankard, Morean Blackwell, A. F. Rice.

Wicomico Magisterial District,—Edgar Blackwell, Warner Hurst, Oscar Kent.

NOTTOWAY COUNTY.

Bellefonte Magisterial District,—Richard Belville, B. E. Cobb, Irby Moncure.

Blendon Magisterial District,—John B. Tuggle, Thornton Jeffress, C. D. Epes.

Winningham Magisterial District,—W. T. Warriner, E. F. Lockett, D. P. McCormick.

Haytokah Magisterial District,—W. H. Jeffress, J. L. Vaughan, William B. Green.

ORANGE COUNTY.

Barbour Magisterial District,—Bennett Bledsoe, George E. Head, E. R. Rohr.

Madison Magisterial District,—W. O. Blakey, R. D. Browning, E. C. Cook.

Taylor Magisterial District,—P. L. Jackson, G. E. Waugh, James Duncan.

Gordon Magisterial District,—P. M. Gibbs, Lindsay Almond, T. B. Morris.

PAGE COUNTY.

Shenandoah Iron Works Magisterial District,—Thomas M. Keyser, George A. Keyser, Isaac Shuler.

Marksville Magisterial District,—Thomas J. Graves, John H. Cave, J. W. Long.
Luray Magisterial District,—R. C. Bragonier, N. B. Smith, John A. Ellis.
Springfield Magisterial District,—W. H. Griffith, L. C. Kibler, George W. Keyser.

PATRICK COUNTY.

Mayo River Magisterial District,—R. L. Joyce, J. R. Boaz, John P. Tatum.
Dan River Magisterial District,—R. H. Dunkley, D. G. Smith, S. G. Dobyns.
Smith's River Magisterial District,—A. C. Turner, William P. Thompson, J. F. Reynolds.

PITTSYLVANIA COUNTY.

Banister River Magisterial District,—H. P. Ferguson, Samuel F. Brown, Samuel R. Stone.
Callands Magisterial District,—James M. Francis, H. E. Clements, M. A. Parrish.
Chatham Magisterial District,—J. Lawson Carter, James A. Davis, Henry C. Allen.
Dan River Magisterial District,—Jesse I. White, Edward Williams, R. L. Dodson.
Pigg River Magisterial District,—A. C. Owen, C. Q. Edwards, W. Tazewell Jefferson.
Staunton River Magisterial District,—H. Clay Harvie, Samuel L. Smith, John D. Glenn.
Tunstall Magisterial District,—Samuel H. Boyd, B. F. Garrett, Thomas J. Robertson.

POWHATAN COUNTY.

Hugenot Magisterial District,—William A. Winfree, David E. Harris, S. Lee Dance.
Spencer Magisterial District,—Enders Word, James Polk Simpson, R. R. Lee.
Macon Magisterial District,—George S. Hurt, James P. Steger, Joseph Hobson.

PRINCE EDWARD COUNTY.

Hampden Magisterial District,—R. E. Stokes, Samuel Lacy, George W. Redd.
Lockett Magisterial District,—B. H. Ligon, W. L. Clark, E. T. Bondurant.
Farmville Magisterial District,—A. R. Venable, Jr., W. H. Richardson, Peter Winston.
Leigh Magisterial District,—J. J. Gilliam, W. S. Dance, L. D. Jones.
Buffalo Magisterial District,—J. P. Glenn, Charles A. Morton, W. B. Binford.

PRINCE GEORGE COUNTY.

Templeton Magisterial District,—C. N. Lee, Thomas Temple, J. H. Hatch, Jr.
Rives Magisterial District,—R. T. Reese, W. H. C. Spicer, Frank B. McCann.
Blackwater Magisterial District,—T. A. Brown, F. A. Epps, J. C. Fenn.
Bland Magisterial District,—George J. Boisseau, J. F. James, Thomas A. Munt.
Brandon Magisterial District,—Mann Page, George T. Darricott, N. H. Burrow.

PRINCESS ANNE COUNTY.

Kempsville Magisterial District,—T. H. Hoggard, Walter H. Smith, Grandy L. Jackson.
Seaboard Magisterial District,—C. T. Chaplain, W. T. Braithwaite, A. Sawyer Woodhouse.
Pungo Magisterial District,—W. J. Craft, J. J. Whitehurst, E. T. Humphries.

PRINCE WILLIAM COUNTY.

Dumfries Magisterial District,—J. F. Wheat, E. G. W. Keys, D. C. Alexander.
Occoquan Magisterial District,—John S. Powell, E. P. Davis, W. B. Glascock.
Coles Magisterial District,—Samuel R. Lowe, Jr., John S. Storke, George M. Goodwin.
Brentsville Magisterial District,—D. P. Edmonds, J. P. Manuel, John A. Brawner.
Manassas Magisterial District,—William N. Lipscomb, David J. Arrington, William M. Wheeler.
Gainesville Magisterial District,—George G. Galleher, A. H. Johnson, William H. Brown.

PULASKI COUNTY.

Pulaski Magisterial District,—J. B. Caddall, C. B. Tate, J. D. Askew.
Newbern Magisterial District,—J. R. Micou, J. A. Pratt, D. M. Painter.
Dublin Magisterial District,—W. W. Hawkins, W. H. Ricketts, W. A. Chumbley.
Hiawassie Magisterial District,—F. I. Smith, Robert Vaughn, A. M. Graham.

RAPPAHANNOCK COUNTY.

Wakefield Magisterial District,—Judson Browning, C. C. Eastham, Robert H. Ricketts.
Jackson Magisterial District,—J. J. Silvey, John Hunton Wood, M. Ritenour.
Hampton Magisterial District,—J. B. Wood, B. R. Miller, Charles Green.
Piedmont Magisterial District,—James H. Fletcher, Carroll Menefee, P. H. O'Bannon.
Hawthorne Magisterial District,—Robert Vanhorn, J. J. Miller, John Coats.
Stonewall Magisterial District,—Charles Browning, J. G. Brown, G. B. Mason.

RICHMOND COUNTY.

Stonewall Magisterial District,—A. A. Taliaferro, G. W. Balderson, T. D. Marks.
Marshall Magisterial District,—G. M. Sydnor, J. F. Garland, W. Y. Morgan.
Washington Magisterial District,—P. Y. Barber, B. B. Griffith, W. A. Bryant.
Farnham Magisterial District,—J. L. Motley, R. C. Lumpkin, W. H. Rice.

ROANOKE COUNTY.

Big Lick Magisterial District,—W. G. Wood, G. W. Gish, M. L. Fellers.
Catawba Magisterial District,—N. D. Barnett, E. C. Thomas, D. H. Shelor.

Cave Spring Magisterial District,—J. Coles Terry, L. L. Greenwood, John Persinger.

Salem Magisterial District,—O. L. Stearns, A. O. Brown, H. B. Pleasants.

ROCKBRIDGE COUNTY.

South River Magisterial District,—W. T. Moore, C. J. Bell, J. H. McCormick.

Lexington Magisterial District,—S. B. Walker, G. A. Jones, W. T. Tolley.

Kerr's Creek Magisterial District,—Daniel Teaford, Charles Lindsay, D. H. Hart.

Buffalo Magisterial District,—J. W. Saville, A. H. Wilson, J. A. Wilkinson.

Natural Bridge Magisterial District,—J. W. Burger, J. H. Overton, W. A. Mohler.

Walker's Creek Magisterial District,—J. B. Wood, Ham Wade, J. F. Deacon.

ROCKINGHAM COUNTY.

Ashby Magisterial District,—Peter C. Tutweiler, Joseph F. Craun, Joseph G. Meyers.

Linville Magisterial District,—Joseph L. Humbert, David Wenger, David M. Hollar.

Plains Magisterial District,—John W. Harrison, Charles E. Fahrney, Charles S. Wunder.

Stonewall Magisterial District,—John W. Blackburn, Joseph A. Hammen, S. M. Yancey.

Central Magisterial District,—J. W. Sheets, George R. Eastham, George G. Herring.

RUSSELL COUNTY.

Lebanon Magisterial District,—J. J. Gilmer, A. F. Hurt, W. H. Fuller.

Elk Garden Magisterial District,—H. W. Martin, Sylvester Albert, Charles W. Belcher.

New Garden Magisterial District,—Boston Steele, Thomas P. Robinson, M. H. Burnett.

Cleveland Magisterial District,—J. S. Tate, Richard D. Smith, Lilburn Finney.

Castlewood's Magisterial District,—John T. Candler, Robert Cooper, W. C. Grigsby.

Copper Creek Magisterial District,—E. M. Ireson, Joseph W. Bostick, Henry Steele.

Moccasin Magisterial District,—John Hanson, Cline Tate, Edward Kitchen.

SCOTT COUNTY.

Estillville Magisterial District,—Ezra Carter, J. L. Shelton, John M. Jennings.

Fulkerson Magisterial District,—George W. Latture, J. H. Hylton, Joel Shelly.

Johnson Magisterial District,—James H. Shoemaker, John F. McConnell, Charles W. Bond.

Floyd Magisterial District,—Patrick Hagan, Jr., Floyd Osborn, B. T. Culberson.

Dekalb Magisterial District,—James M. Harris, W. P. Ramey, W. B. Franklin.
Taylor Magisterial District,—S. L. Cox, Rufus Kilgore, J. F. Richmond.
Powell Magisterial District,—C. C. Johnson, C. C. Palmer, Roten Hurst.

SHENANDOAH COUNTY.

Lee Magisterial District,—G. A. Guard, B. F. Garber, D. Saylor Neff.
Madison Magisterial District,—E. T. Smith, A. B. Clinedinst, J. W. Hollar.
Johnson Magisterial District,—J. A. Dysart, William Keller, Charles M. Golladay.
Ashby Magisterial District,—Joseph H. Ruby, J. G. Neff, Ira Brinker.
Stonewall Magisterial District,—George W. Miley, Martin F. Snarr, D. F. Spiker.
Davis Magisterial District,—William Green, George H. Snarr, J. W. Eberly.

SMYTH COUNTY.

Marion Magisterial District,—Henry B. Haller, John T. Fry, James A. Groseclose.
Rich Valley Magisterial District,—J. D. Buchanan, Joseph Roberts, George P. Phipps.
St. Clair Magisterial District,—T. K. McKee, Robert C. Williams, Albert P. Killinger.

SOUTHAMPTON COUNTY.

Boykin's Magisterial District,—W. P. Gillette, W. J. Gillette, E. C. Majette.
Newsom's Magisterial District,—James R. Darden, George W. Prince, C. F. Whitfield.
Dreyryville Magisterial District,—R. N. Musgrove, R. H. Crichton, J. Gillette Claud.
Franklin Magisterial District,—W. H. Arthur, R. B. Bryant, A. M. Brownly.
Jerusalem Magisterial District,—R. B. Joyner, J. L. Cobb, John N. Sebrell, Sr.
Berlin and Ivor Magisterial District,—W. W. White, A. M. Atkins, J. C. Davis.

SPOTSYLVANIA COUNTY.

Courtland Magisterial District,—S. G. Howison, G. W. Clarke, John J. Brooks.
Chancellor Magisterial District,—L. M. Estes, E. H. C. Bailey, J. B. Trigg.
Livingston Magisterial District,—E. W. Smith, M. F. Waite, R. L. Biscoe.
Berkley Magisterial District,—L. G. Maddox, C. Richelieu Coleman, L. P. Chewning.

STAFFORD COUNTY.

Hartwood Magisterial District,—J. M. Hull, C. J. Chartters, Andrew Briggs.
Rock Hill Magisterial District,—Eddy L. Stern, Thompson S. Briggs, Nelson T. Shacklett.
Aquia Magisterial District,—James Ashby, Robert E. Duvall, Jack F. Clift.
Falmouth Magisterial District,—D. M. Lee, C. F. Towson, Jack L. Gouldin.

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SURRY COUNTY.

Blackwater Magisterial District,—S. B. Barham, Jr., G. F. Maynard, J. E. Rogers.
Guilford Magisterial District,—J. W. Rodgers, Jesse B. Riggan, J. O. Fitchett.
Cobham Magisterial District,—G. A. Savedge, W. Z. Holland, J. R. Barham.

SUSSEX COUNTY.

Courthouse Magisterial District,—W. T. Freeman, Wynn Crawford, Philip Rogers.
Henry Magisterial District,—W. H. Moore, J. H. Conway, J. T. Parker.
Newville Magisterial District,—E. T. Birdsong, R. H. Stevenson, L. J. Wrenn.
Stony Creek Magisterial District,—W. T. Saunders, F. E. Poole, G. R. Bobbitt.
Wakefield Magisterial District,—D. A. Marks, R. L. Faison, M. H. West.
Waverly Magisterial District,—A. E. Kitchen, J. P. Lilly, W. T. Harvell.

TAZEWELL COUNTY.

Clear Fork Magisterial District,—E. King Crockett, George H. Zimmerman, J. L. Baber.
Jeffersonville Magisterial District,—J. H. Lewis, J. H. Whitley, J. Ed. Peery.
Maiden Spring Magisterial District,—S. J. Thompson, E. B. Scott, W. P. Payne.

WARREN COUNTY.

South River Magisterial District,—William Robinson, L. H. Fristoe, L. F. Updyke.
Front Royal Magisterial District,—I. F. Beaty, John Peyton, C. M. Anderson.
Fork Magisterial District,—W. A. Baker, Charles Rogers, J. K. Putnam.
Cedarville Magisterial District,—Robert McKay, James W. Templeman, T. Haney.

WARWICK COUNTY.

Stanley Magisterial District,—J. H. Clements, W. P. Chapman, E. C. Crafford.
Denbigh Magisterial District,—J. Toomer Garrow, W. H. Curtis, James C. Williamson.
Newport Magisterial District,—A. Haughton, A. J. Jones, T. A. Sinclair.

WASHINGTON COUNTY.

Abingdon Magisterial District,—T. S. Hamilton, J. S. Gray, E. A. Dunbar.
Goodson Magisterial District,—C. F. Keller, W. R. Stockton, J. W. Riddle.
Holston Magisterial District,—W. R. Preston, W. J. Snodgrass, T. J. Edmondson.
Glade Spring Magisterial District,—Alexander Stuart, George Huff, Wesley Burhman.
Saltville Magisterial District,—R. G. Buchanan, M. W. Litton, E. K. McConnell.
North Fork Magisterial District,—William E. Roberts, E. H. Lee, W. R. Mongle.
Kinderhook Magisterial District,—J. T. Martin, J. H. Johnson, J. W. Kaylor.

WESTMORELAND COUNTY.

Washington Magisterial District,—W. C. Minor, James R. Fones, H. J. Horner.
Montross Magisterial District,—W. C. England, J. W. Hutt, Jr., E. F. Porter.
Cople Magisterial District,—W. W. Walker, George Vansant, B. F. Brown.

WISE COUNTY.

Richmond Magisterial District,—J. W. Kelly, A. M. Lea, R. T. Irvine.
Lipps Magisterial District,—J. D. Clay, W. A. Carrico, C. J. Edwards.
Roberson Magisterial District,—Troy Peak, Henry Adams, Thomas C. Alley.
Gladeville Magisterial District,—J. J. Kelly, Jr., A. N. Kilgore, W. H. Bond.

WYTHE COUNTY.

Ft. Chiswell Magisterial District,—W. Dick Sanders, J. E. Simmerman, F. M. Tate.
Lead Mines Magisterial District,—Tom Blair, John H. Huddle, J. T. Brooks.
Speedwell Magisterial District,—George A. Lambert, Samuel C. Landreth, Eugene Kyle.
Black Lick Magisterial District,—John L. Brown, William M. Coley, M. G. Porter.
Wytheville Magisterial District,—William Terry, V. H. Gibboney, J. S. Lawson.

YORK COUNTY.

Bruton Magisterial District,—D. R. Norment, William B. Schneck, C. H. Post.
Nelson Magisterial District,—C. H. Sheild, W. M. Crooks, J. W. Rogers.
Grafton Magisterial District,—J. J. Nottingham, J. E. Crockett, Arthur B. White.
Poquoson Magisterial District,—W. J. Stores, Walter Evans, John G. Wornom.

CITY OF ALEXANDRIA.

1st Ward,—Edgar Snowden, Peter Aitcheson, O. C. Phillips.
2nd Ward,—Henry Strauss, George E. Price, C. M. Schwab.
3rd Ward,—Charles B. Marshall, George W. Bontz, B. F. Penn.
4th Ward,—C. J. W. Summers, William E. Fendall, Champ Walker.

CITY OF BRISTOL.

J. N. Johnson, S. H. Rogers, George W. Wolfe.

CITY OF BUENA VISTA.

1st Ward,—G. W. Leckie, W. P. Lee, W. T. Paxton.
2nd Ward,—Hugh A. White, S. P. Gibson, T. L. Brown.

CITY OF CHARLOTTESVILLE.

1st Ward,—E. O. McCue, J. E. Early, A. V. Conway.
2nd Ward,—F. M. Wills, B. Letterman, H. Spangler.

3rd Ward,—J. B. Norris, E. L. Jarman, Grafton D. Payne.
4th Ward,—C. G. Sinclair, Roy K. Flannagan, Thomas S. Jones.

CITY OF DANVILLE.

1st Ward,—William Ayres, Jr., Garland S. Wooding, Thomas Hamlin.
2nd Ward,—A. W. Douthat, C. H. Richmond, W. W. Clark.
3rd Ward,—J. B. Fuller, A. C. Edmunds, John G. Lea.
4th Ward,—B. H. Custer, W. D. Cook, M. F. Dove.

CITY OF FREDERICKSBURG.

Upper Ward,—E. D. Cole, S. E. Eastburn, J. J. Berrey.
Lower Ward,—A. W. Embrey, Henry Dannehl, J. Wilmore Cox.

CITY OF LYNCHBURG.

1st Ward,—Leon Goodman, G. P. Watkins, H. A. Southall.
2nd Ward,—Fred. Harper, S. Garland Hamner, J. A. Scott.
3rd Ward,—C. A. Colhoun, A. B. Percy, H. D. Johnson.

CITY OF MANCHESTER.

1st Ward,—C. V. Green, J. H. Busby, Carter C. Jones.
2nd Ward,—J. R. Perdue, Jr., L. M. Nunnally, A. G. Evans.
3rd Ward,—F. S. Robertson, J. L. Owens, M. A. Rightsell.
4th Ward,—B. M. Robertson, W. L. Porter, W. T. Davidson.

CITY OF NEWPORT NEWS.

1st Ward,—A. A. Langhorne, S. W. Holt, P. J. Mugler.
2nd Ward,—Harry Howard, John Stigler, Samuel Boyd.
3rd Ward,—R. J. Charles, A. J. Moore, S. C. Garrow.
4th Ward,—L. R. Timberlake, George H. Adams, W. P. Wash
5th Ward,—T. F. Stearnes, J. T. Marston, J. W. Phillips.
6th Ward,—C. D. West, Grant Colvin, R. T. Styll.
7th Ward,—George W. Burcher, W. A. Post, William Haley.

CITY OF NORFOLK.

1st Ward,—A. M. Higgins, H. N. Poulson, J. A. Baecher.
2nd Ward,—Barton Myers, A. J. Dalton, Willoughby T. Cooke.
3rd Ward,—Walter H. Taylor (son of Richard), James E. Heath, Jr., Robert S. Broughton.
4th Ward,—James T. Holland, James G. Brownley, Charles C. Grant.
5th Ward,—N. C. Pamplin, A. M. Cousins, James L. Winston.
6th Ward,—Robert W. Tomlin, Victor Parks, W. Leigh Williams.
7th Ward,—P. C. Stanworth, J. T. Deal, Ira T. Holt.

CITY OF PETERSBURG.

1st Ward,—J. W. Wells, J. M. Saunders, F. S. Myers.
2nd Ward,—J. J. Birchett, J. W. Friend, N. E. Wicker.

3rd Ward,—A. R. Moody, Samuel Gentry, W. D. Spratley.
4th Ward,—C. P. Coldwell, R. G. Bass, R. L. Claytor.
5th Ward,—James A. Collier, R. W. Ford, Thomas B. Ivey.
6th Ward,—W. E. Meredith, B. D. Akers, D. C. Duane.

CITY OF PORTSMOUTH.

1st Ward,—Antonio L. Bilisoly, W. Clark Moore, Charles R. Welton.
2nd Ward,—Thomas J. Barlow, Calder S. Sherwood, Frank L. Crocker.
3rd Ward,—Charles H. Morris, James N. Peed, John C. Parkerson.
4th Ward,—John T. King, Joseph P. M. Joyce, L. H. Davis.
5th Ward,—L. M. Palmer, Charles W. Johnson, George R. Trant.

CITY OF RADFORD.

West Ward,—Charlie Ross, G. C. Wharton, W. A. Wilson.
East Ward,—H. C. Preston, R. J. Noell, J. F. Baldwin.

CITY OF RICHMOND.

Marshall Ward,—R. T. Lacy, W. M. Williams, James A. Black.
Jefferson Ward,—Henry M. Tyler, Thomas W. Joseph, George E. Bowden.
Madison Ward,—A. S. Lanier, Robert Lee Traylor, Thomas W. Walsh.
Monroe Ward,—B. Rand. Wellford, B. R. Selden, W. T. Walker.
Lee Ward,—Roscoe C. Nelson, R. T. Davis, W. J. Kimbrough.
Clay Ward,—Ernest M. Long, Robert B. Pettis, John R. Hooper.
Jackson Ward,—J. H. Bradley, John A. Haley, John McEneany.

CITY OF ROANOKE.

1st Ward,—Oscar D. Derr, C. W. Beckner, J. A. Fishburn.
2nd Ward,—J. H. Earman, B. Rust, A. M. Nelson.
3rd Ward,—E. J. McDonald, W. E. Thomas, Patrick Foy.
4th Ward,—Junius McGhee, J. B. Ambroselli, H. D. Colley.
5th Ward,—M. P. Scott, S. W. Farrar, J. A. Page.

CITY OF STAUNTON.

1st Ward,—J. A. Hutcheson, W. B. McChesney, R. E. R. Nelson.
2nd Ward,—John M. Carroll, George W. Blackley, Dennis Brown.

CITY OF WILLIAMSBURG.

L. W. Lane, Jr., C. B. Trevillian, W. C. Johnson.

CITY OF WINCHESTER.

1st Ward,—J. M. Haymaker, Adam Forney, J. W. Taylor.
2nd Ward,—Julian F. Ward, J. Brad. Beverly, Harry Wood.
3rd Ward,—W. W. Wall, Charles Fitzpatrick, Ross Barr.
4th Ward,—W. P. McGuire, T. M. Barr, Joseph Kiger.

140&141 And on the 15th day of November, 1902, the following order was entered and filed, to-wit:

Order to Show Cause.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, *vs.* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	In Prohibition. No. 1759.

Upon the petition for a writ of prohibition.

This day came the petitioners by John S. Wise and James H. Hayes, Esquires, their attorneys, and exhibited to the court their petition and exhibits marked "A," "B" and "C," upon which petition and exhibits they have prayed the issuance of a writ of prohibition delivered to the above-named defendants, prohibiting them in their character as the board of State canvassers of Virginia, or any of them acting as members of the board of State canvassers, from canvassing, counting, determining upon, or certifying, or otherwise acting upon, any returns or abstracts of returns in the office of the secretary of the Commonwealth of Virginia, purporting to be returns of an election held in the State of Virginia on Tuesday, November 4, 1902, for representatives in Congress from the State of Virginia, or in anywise dealing with, counting, canvassing, considering, determining upon, or certifying, the results of said returns, on the ground that by reason of the disregard of
142 law and failure to hold said election according to the laws of the State of Virginia and the United States, said returns are not lawful returns, or of a lawful election held for the representatives in Congress from the State of Virginia on the date aforesaid, but are null, void, and of no effect. And thereupon it is ordered that the said respondents, Andrew J. Montague, governor of Virginia, David Q. Eggleston, secretary of the Commonwealth of Virginia, Morton Marye, auditor of public accounts of Virginia, Asher W. Harman, Jr., treasurer of the State of Virginia, and William A. Anderson, attorney-general of Virginia, who constitute

the board of State canvassers of Virginia, be and they are each, all and every one of them required to appear before this court at Richmond, Virginia, upon the 20th day of November, 1902, at 11 o'clock, a. m., to show cause, if any they have or can show, why the writ of prohibition prayed for in said petition should not be granted against them as individuals, as holders of the respective offices above named, and as constituting, by virtue of their said offices, the board of State canvassers of Virginia, prohibiting them from considering, canvassing, counting, determining upon, certifying, or otherwise acting upon, any returns or abstracts of returns in the office of the secretary of the Commonwealth of Virginia, purporting to be returns of an election held in the State of Virginia on Tuesday, November 4th, 1902, for representatives in Congress from the State of Virginia, or in anywise dealing with, or certifying, the results of said returns.

Ordered further that copies of the foregoing petition and of this order shall be served upon each and all of said defendants on or before the 17th day of November, 1902, but no copy of the
143 exhibits filed with the said petition shall be served upon said respondents, for the reason that said exhibits are public documents, accessible to each and all of said respondents.

EDMUND WADDILL, JR., *U. S. Judge.*

Marshal's Return.

I certify that I this day delivered a true copy of the petition in the above case, together with a true copy of the above order, upon the following named defendants: Andrew J. Montague, governor of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia.

MORGAN TREAT,
United States Marshal, Eastern District of Virginia.

Richmond, Virginia, November 15th, 1902.

And further on the 17th day of November, 1902, by delivering a true copy of the petition in this cause, together with the order therein, to the following named respondents; David Q. Eggleston, secretary of the Commonwealth of Virginia, in person at his office in the city of Richmond; and by delivering a true copy of said petition and order to Mrs. William A. Anderson, wife of William A. Anderson, attorney-general of Virginia, at his residence 301 E. Franklin street, Richmond, Virginia, and explaining the nature thereof to her, Mr. Anderson being out of the city.

MORGAN TREAT,
United States Marshal,
By M. A. COLES,
Chief Office Deputy.

144 *Special and Limited Appearance of Defendants.*

Filed November 20th, 1902.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, *vs.* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	In Prohibition.	No. 1759.

We, the undersigned attorneys at law, hereby appear in behalf of the respondents in the above-named cause, for the purpose of objecting to the jurisdiction of this court to entertain the said cause, or to make any order therein against the respondents, and for that purpose alone; and, without waiving the objection to the jurisdiction of this court or the said limited and special appearance, but insisting thereon, the undersigned move the court to enlarge the rule heretofore issued in this cause, which was made returnable to this day, until Friday, the 28th day of November, 1902, at eleven o'clock a. m., in order that the said respondents may have further time to make answer to said rule. And this appearance is made specially and solely for the purpose of objecting to the jurisdiction of this court in said cause, and for no other purpose whatsoever; and said motion for the enlargement of said rule is in no way intended to waive the objection to the jurisdiction of this court, or to impair the special and limited character of this appearance.

WILLIAM A. ANDERSON,
Attorney-General of Virginia.
FRANK W. CHRISTIAN,
Attorneys for Respondents.

145 And on the 20th day of November, 1902, following order was entered and filed, to wit:

Order.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, *vs.* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	In Prohibition. No. 1759.

This day came the respondents, by their attorneys, William A Anderson, attorney-general of Virginia, and Frank W. Christian, and entered their special and limited appearance for the purpose of objecting to the jurisdiction of this court in this cause, and for no other purpose.

And, not waiving their said special appearance, the attorneys for the respondents moved the court to enlarge the rule hereinbefore granted until Friday, the 28th day of November, 1902; said limited and special appearance being in writing and filed with the papers in this cause. And, accompanying said motion to enlarge the rule, the respondents, by their counsel, in consideration of the enlargement of the said rule, give the court and opposing counsel the assurance that said board of State canvassers will not ascertain the result of the votes cast, or issue any certificates of election to the candidates for representatives in the Congress of the United States at the election held November 4th, 1902, in the State of Virginia, until after the 28th day of November, 1902; provided, further, unless otherwise ordered by some court of competent jurisdiction, that in case any leagl proceedings shall be instituted *an* any other court to compel said board of State canvassers to canvass said votes or issue said certificates, said board will immediately notify counsel for the petitioners so as to give them opportunity to protect their rights before said board acts under any order which may be issued by another court.

Thereupon, the petitioners not objecting to the entry of the said order, said rule is accordingly enlarged.

EDMUND WADDILL, JR., *Judge.*

Answer of Defendants.

Filed November 28th, 1902.

146 *Prohibition Suit.*

JONES AND OTHERS, Complainants,
vs.
VIRGINIA STATE BOARD OF CANVASSERS, Respondents.

Answer of Respondents to Rule to Show Cause Why a Writ Shall not Issue.

William A. Anderson, attorney-general, and
Frank W. Christian, for the respondents.

146*a* In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and EDGAR POE LEE, Petitioners,
vs.
ANDREW J. MONTAGUE, Governor of Virginia; DAVID Q. EGGLESTON, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of the Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of the Commonwealth of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.

In prohibition.

The answer of respondents to a rule made in this cause returnable on November the 20th, 1902, and afterwards enlarged until this day summoning these respondents to appear and show cause, if any they can, why the writ of prohibition as prayed for in said petition should not be granted against them in accordance with the prayers of said petition.

147 These respondents, for answer to said rule, answer and say:

(1.) They deny that this court has any jurisdiction to entertain this case, or to enter any order therein, because the same is an action or proceeding against the State of Virginia and is in violation of the eleventh amendment to the Constitution of the United States. The right to relief asserted in the bill, if cognizable at all by any judicial forum, is of a political character, and seeks to control these respondents, who have no private interest therein, in their official character as constituting the said board of State canvassers in the discharge of executive, political and governmental duties and functions. That the action of the said board is really the political and governmental action of the State of Virginia itself; that the

State of Virginia is directly interested, and would be directly affected in some of her most important rights by any relief granted in this proceeding; that Virginia is an indispensable party before any such relief can be given; and if Virginia is represented by these respondents, the said proceeding constitutes a suit against the State, and is forbidden by the eleventh amendment to the Federal Constitution; and if these respondents do not represent the State of Virginia, she is an indispensable party; and since the eleventh amendment forbids her being made a party, the proceeding is inhibited and cannot be entertained by this court.

(2.) Respondents further say, that if they are in error in the foregoing contention, still the rights asserted by the plaintiffs and the duties attempted to be restrained, are political in their character; that the duties and functions of these respondents, the performance of which the petitioners seek to prohibit, are executive and
148 political functions and duties, in the performance of which not only the State of Virginia, but many other persons, including all persons entitled to vote at the election held in Virginia on November the 4th, 1902, have an interest.

(3.) That this court cannot interfere by writ of prohibition with the acts of your respondents constituting the board of State canvassers of the State of Virginia, touching the canvassing of the returns and ascertaining the result of the election for members of the House of Representatives held on November the 4th, 1902, or issuing certificates of such election to those receiving the majority of the votes cast; and that the attempted exercise of such jurisdiction would invade the province and independence of the House of Representatives, a part of a co-ordinate branch of the Federal Government.

(4.) That the writ of prohibition only lies as an extraordinary writ to control and supervise an inferior court so as to prohibit such court from exceeding the bounds of its jurisdiction.

(*a.*) These respondents state, that the board of State canvassers of Virginia is not a court. Its functions and duties are all set forth in section 142 of the Code of Virginia of 1887, and in section 143, which latter section merely prescribes how an election may be determined in case of a tie; that the said functions and duties, while political and executive in their nature and while they involve a certain amount of discretion, are not judicial; and, therefore, on this ground no prohibition can issue against this board from any court.

(*b.*) Such prohibition can only issue to supervise and control the jurisdiction of an inferior court; and these respondents say that the board of State canvassers of Virginia, if it were
149 a court at all, would not be an inferior court to this court, but would constitute a court of the Commonwealth of Virginia established under her laws; and that, therefore, no prohibition could issue to restrain its jurisdiction. Section 720 of the Revised Statutes of the United States expressly provides that a writ of injunction shall not be granted by any court of the United States to

stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. Your respondents submit that this proceeding is embraced within the spirit of this provision and doubtless writs of prohibition would have been also specifically named except for the general principle that such writs issue only from superior to inferior courts; and it was not contemplated that any court of a State could be considered an inferior court to the Federal courts, except possibly in cases where appeals are provided for from the courts of the State directly to the Supreme Court of the United States.

(c.) Further, the office of the writ of prohibition is simply to restrain the action of an inferior court because the proposed proceeding or act sought to be prohibited is beyond the bounds of its jurisdiction. These respondents say that the acts sought to be prohibited here are within the jurisdiction of the said board of State canvassers of Virginia under a valid statute of the State of Virginia passed, not only in pursuance of the constitution of Virginia, but pursuant to a permission or provision contained in the Constitution of the United States.

(5.) In order that the complainants may maintain this petition, they must show that the case is embraced within the provisions of some act of Congress conferring the particular jurisdiction on
150 this court; and they submit that there is no such act of Congress; and, therefore, the court is without jurisdiction to entertain this proceeding. It has been repeatedly held by the Supreme Court of the United States, that writs of mandamus (which stand upon the same footing and are governed by the same rules as writs of prohibition) are not embraced within the eleventh section of the act of 1789, or any amendment thereof, giving to the circuit courts cognizance of suits of a civil nature at law or in equity, arising under the Constitution or laws of the United States, or between citizens of different States. Such writs were considered, at the time of the adoption of the Federal Constitution and the judiciary act, high prerogative writs extraordinary in their character, not issuing as of right. The jurisdiction of them was conferred by the fourteenth section of the judiciary act which now (slightly amended) constitutes section 716, of the Revised Statutes of the United States, which reads as follows:

"The Supreme Court and the circuit and district courts shall have the power to issue all writs of *scire facias*. They shall also have power to issue all writs not specifically provided by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

It is settled that the circuit courts of the United States have, by virtue of this section, no power to issue original writs of prohibition, but only ancillary writs of prohibition when necessary, "for the exercise of their respective jurisdictions"—that is, for the purpose of enforcing, or preventing interference with, jurisdiction in a
151 case already pending in the court, the said writ being merely auxiliary to and in aid of a jurisdiction already rightfully acquired.

(6.) Respondents submit, and aver that the petition sets out no case upon other grounds appropriate for judicial cognizance. The only grievance asserted by the complainants is, that the registrars refused to place them on the registration lists. They do not allege that either of them offered to vote. They do not allege that either of them resorted to the means provided in the registration ordinance for correcting any error or injustice on the part of the registrars by appeal, first, to the corporation court, and from the decision of that court to the supreme court of appeals of Virginia, the highest court in the State, which appeal could be taken without costs.

Having failed to avail themselves of means thus provided for enforcing their primary right, they cannot come to this court for a writ of prohibition against these respondents discharging their duties under the law, in the performance whereof all persons voted for at said election, and the United States and the Commonwealth of Virginia itself, are directly interested.

It can hardly be supposed that any court, in order to protect these complainants who have utterly failed to avail themselves of means for protecting themselves, will grant the extraordinary writ of prohibition to prevent the exercise of a jurisdiction in which so many interests are concerned not represented before the court, even if the grant of such relief were not forbidden upon other grounds stated in this answer.

(7.) While these respondents do not feel that it is either necessary or proper that they should at this stage notice or answer all the details of the complainants' bill, it is deemed proper that they
152 should notice and take issue upon some of the positions and statements made in said bill, which they will now proceed to do:

(a.) In the first place, they think it is not improper that they should express the surprise they feel to find that at this late day, nearly forty years after the end of the late unhappy war, serious reliance should apparently be placed upon the restrictions upon the State of Virginia in respect to suffrage attempted to be imposed by the act of Congress of January the 26th, 1870.

The right of suffrage is one derived from the State itself. The only limitation upon the power of the State springs from the provision of the Constitution of the United States that such right shall not be abridged or denied on account of race, color or previous condition of servitude. The only right in respect to suffrage derived from the Federal Constitution is the right to be exempt from discrimination on account of race, color or previous condition of servitude; and the right of voters in the State who have the qualifications prescribed by the State for voters of the most numerous branch of the State legislature to vote for members of Congress.

The right of a State to determine for itself from time to time according to then existing exigencies what persons or classes of persons possess sufficient intelligence, virtue and interest in the Commonwealth to entitle them to exercise the right of voting is one of the most fundamental and important rights which can belong to a

free people. The existence of such right to regulate suffrage is as important to those who may be unfit for its exercise as it is to the welfare and happiness of those entrusted with it, and it may be safely affirmed that this right to regulate suffrage within its borders is possessed by the State of Virginia to the same extent and in the same degree as it is by the States of Massachusetts or New York. It is denied that the restrictions attempted to be imposed by the act of Congress of January the 26th, 1870, were ever expressly accepted by the State of Virginia. Even the legislature of the State would have no power to impose such a fundamental limitation upon the power of the State.

The act of Congress of January the 26th, 1870, was part and parcel of the reconstruction legislation adopted by Congress after the
153 war, which legislation has never been passed upon directly, we believe, by the Supreme Court of the United States; but it can hardly be said that there is any doubt in the professional mind of this country as to what fate that legislation would have received if it had ever been allowed to be subjected to the decision of the Supreme Court of the United States.

That tribunal has held repeatedly that, while the effect of the late war was to establish hostile governments in the States who undertook to secede and to sever temporarily the relations of the *governments* of those States to the Union, the *States* themselves were never beyond its pale, and that after the question of the right of those States to secede had been settled by the arbitrament of arms, they remained in the Union, subject to the duties and limited surrender of power contained in the Federal Constitution and also entitled to all the rights granted by it or reserved to themselves or their people.

The power to pass the reconstruction measures was based solely upon the requirement of the Constitution that "the United States shall guarantee to every State in this Union a republican form of government."

Under this provision, Congress had the right to adopt only such measures as were necessary and appropriate to secure that result. The power was a power of guaranteeing or insuring, not a power of originating or establishing provisions of government in the several States.

We have seen that a government may be republican in form without a universal or unlimited suffrage. Indeed, it is inconsistent with any wise or well-ordered government that there should be a basis of suffrage which is unalterable in view of the changing circumstances and conditions of the body politic. It must, therefore, be palpable that the restriction embodied in the act of Congress of January the 26th, 1870, was not a necessary and appropriate means of guaranteeing to the State of Virginia a republican form of government and that, therefore, Congress had no power in this extra-constitutional method to inject any such restriction into the fundamental law of this State.

When the people of Virginia had adopted the constitution
154 of 1869 and elected executive and legislative officers and members of the house of representatives they had organized a republican form of government as required by the Federal Constitution, and the obligations of Virginia (the principal obligor) to the Constitution of the United States having been performed, there remained nothing for the guarantor to do.

The right of representation in Congress belonged to the State of Virginia under the Constitution of the United States as much as it did to the other States in the Union, and it was entitled to the enjoyment of that right without condition and without restriction. Accordingly, it must follow that this restriction upon the fundamental rights of the State as a condition to the enjoyment of its constitutional right to representation in Congress was not binding upon the State either in law or in morals.

(*b.*) The schedule and the ordinance of registration referred to in the bill formed a part of, and were incidental to, the constitution of 1902. The ordinance is referred to repeatedly in the constitution itself as a part of its provisions, and some of the articles of the constitution were made dependent for their effect and execution upon the said ordinance.

The respondents submit that the whole of the said constitution, schedule and ordinance were validly adopted by the constitutional convention and that the same became operative and effective for all purposes as a constitution of this Commonwealth on the 10th day of July, 1902, in accordance with the mandate of the said convention.

The power of the convention to ordain the constitution without submission for ratification to the vote of the people is beyond serious question. Mr. J. R. Tucker, in his work on the Constitution, says:

"During the last half century or more it has been the usual practice for the convention to frame the constitution and then submit it to a popular vote for final ratification. But this practice has had exceptions, and it may be safely stated that the validity of a constitution will not be held to depend upon its final ratification by popular vote."

1st Tucker on the Constitution, page 69.

155 This learned constitutional author points out that the first constitutions of all of the original States, including Virginia, were ordained by conventions without ratification by the people; that the first constitution of Virginia, drawn by George Mason and so ordained, was held to be valid by our court in *Kamper v. Hawkins*, 1st Va. Cases, 20, and that the Constitution of the United States was adopted by a convention and ratified by conventions in the several States without submission to popular vote and that the various amendments of the Federal Constitution have been adopted without ratification by the people; that the same practice has been adopted recently in several of the Southern States, and that in the case of

Mississippi the validity of its constitution so adopted was affirmed in the case of *Williams v. Mississippi*, 170 United States, 213, remarking, however, that it seemed that the question under discussion was not raised in that case.

It may be added that the Virginia constitutional conventions of 1830 and of 1850 in effect ordained their suffrage articles, submitting the residue of the constitution to the enlarged class of voters enfranchised by them.

It is respectfully submitted that a convention representing, as it does, the body politic, itself has inherent and absolute power to ordain a constitution without submitting it back to the people themselves. This is still clearer in Virginia, when the provisions of article 12 of the constitution of 1869, which provide for changes in the constitution, are examined. The first section of article 12 provides for changes to be effected through the medium of two legislatures of the State, chosen at successive elections, it being provided that amendments may be proposed and if agreed to by a majority of the members of both houses, the same shall be referred to the General Assembly chosen at the next general election; and if that General Assembly shall agree to the proposed amendment it shall be its duty to submit the amendment to the people; and if the people approve and ratify the amendment, it shall become a part of the constitution.

Section 2 of article 12 is in strong contrast with the pro-
156 visions just referred to. Section 2 provides for the adoption of a new, revised or amended constitution, through the action of a constitutional convention, and instead of providing that its action shall be submitted to ratification by popular vote, it entirely omits any such requirement, and by the plain meaning of the language used confers final and absolute power upon the convention itself to ordain the constitution adopted by it. It is provided that at the general election to be held in the year 1888 and in each twentieth year thereafter and also at such time as the General Assembly may by law provide, the question, "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to the qualified electors.

In pursuance of this provision, the legislature of Virginia, by an act passed on March 5, 1900, submitted the said question in those prescribed terms to the people. The election held under the said act resulted in favor of the convention. This definitely fixed the status and powers of the convention beyond the reach of further legislative interference or restriction. The constitution provided, "in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly at its next session shall provide by law for the election of delegates to such convention."

By an act passed on February the 16th, 1901, the legislature did, in obedience to this constitutional requirement, provide for the election of members of the convention. To that extent, and to that extent only, was the act of February the 16th, 1901, constitutional

and binding. The addition thereto requiring the constitution adopted by the convention to be submitted to ratification by the vote of the people was beyond the legislative power.

In addition to this, it is believed that no constitution adopted by a convention and recognized by all the departments of government has ever been held by any court to be invalid. What constitutes the constitution of a State and when the same has become operative and effective and binding upon the people are political questions; and it has been held by courts of the highest authority that
157 when a constitution has been so recognized and accepted by all departments of government in the State, as has been done in the case of the present constitution of Virginia, the question of its validity is closed and cannot be any longer open to question. In addition to the acts of recognition referred to in the bill, the said constitution has been recognized by acts passed by the General Assembly of Virginia and approved by the governor since the said constitution went into effect.

So that, even if there could be any serious doubt about the original power to ordain the constitution of 1902, and if this question is one which can ever be passed upon by the courts of another jurisdiction than that of the State itself whose constitution is the subject of inquiry, in the present case the bill alleges the fact that the constitution of 1902 and its schedule and ordinance have been recognized by every department of government, and we, therefore, submit that its constitutionality and validity cannot now be questioned or denied.

(c.) Respondents submit and maintain that it was neither necessary nor proper that members of the convention should take any oath as officers of the State under the former constitution of the State and that it is a matter of no moment, so far as the validity and effect of the said constitution is concerned, whether such oath were taken or not.

(*d.*) These respondents deny that the right of citizens of the United States to vote is denied or abridged on account of race, color or previous condition of servitude by the provisions of the said constitution, schedule or ordinance of registration, or any of them. It is submitted that there is not a single provision in the said constitution, schedule or ordinance which makes the slightest distinction between citizens of the United States on account of race, color or previous condition of servitude. It is also denied by these respondents that any denial or abridgement of the rights of citizens of the United States to vote has been made on account of race, color or previous condition of servitude by the State of Virginia or by the officers of the State of Virginia in the enforcement, application and execution of the provisions of the said constitution, schedule
158 and ordinance, or any of them. These respondents are informed and believe that the provisions of the ordinance of registration have been generally, if not in all cases, fairly and impartially administered without such alleged discrimination by the registrars selected and appointed by the constitutional convention

as being men of character and standing in their various localities. In the discharge of their duties, the registrars were subject to severe penalties of fine and imprisonment under the statute of Virginia if they wilfully or maliciously rejected from registration or corruptly registered any person contrary to law. (See section 3854 of the Code of Virginia of 1887.) And if the registrars either purposely or by mistake improperly refused registration to any person, means of redress were afforded by appeal to the circuit and corporation courts in the different counties and cities of the State, with a right of further appeal to the supreme court of appeals, the highest court in the State, without liability for costs.

(*e.*) These respondents deny as scandalous and false the unfounded statements contained in the bill, to the effect that the governor of Virginia and the other executive officers of the State, the judges of the courts of record of the State and the members of the General Assembly of the State have united in an attempt to abandon the government of Virginia under which they were elected to office, in violation of their duties to the people or have attempted to establish and proclaim said constitution and impose the same on the people of Virginia contrary to their will, without giving the people of Virginia an opportunity to be heard, well knowing they would never ratify the same; and also the charge that the said officers, executive, judicial and legislative, have been at any time in conspiracy with the "dominant faction in said convention" for the purpose of accomplishing those results, as alleged in the bill, or for any other purpose whatsoever; or have entered into any combination or conspiracy with said "dominant faction" or any other persons or set of persons for any purpose whatsoever, as complained of in the bill. It is true that the said officers of the State, executive, judicial and legislative,
159 have recognized the said constitution as a valid and binding instrument, but they have not done so in pursuance of any combination or conspiracy of any kind, but, as your respondents believe and aver, because they were of opinion that it was their plain duty to recognize and support its provisions.

These respondents do not deem it necessary to reply in any further detail to many other matters contained in said bill, because it is not deemed proper or material to do so at this time. The said constitution has not only been thus expressly recognized by every department of the government of the State, but has been acquiesced in and accepted by the great body of the people of Virginia. It is proper to consider the disastrous consequences of now unsettling what has thus become an accomplished political fact of the highest importance in the State and to point out that the result of a decree to that effect emanating from this honorable court would necessarily produce a condition of unrest, uncertainty and chaos destructive of the peace, good order and welfare of the State.

In view of these results, as well as the other injurious consequences in the various other aspects heretofore pointed out in this answer which would flow from such a decree, it is respectfully submitted that this court will weigh with the most anxious care the grounds

of its jurisdiction and the right of the complainants to the relief sought in their bill before it will undertake to enter any decree in this cause.

And having fully answered, these respondents ask to be excused from further attendance upon this court.

ANDREW J. MONTAGUE,
Governor of Virginia.
D. Q. EGGLESTON,
Secretary of the Commonwealth of Virginia.
MORTON MARYE,
Auditor of Public Accounts of Virginia.
ASHER W. HARMAN, JR.,
Treasurer of Virginia.
WILLIAM A. ANDERSON,
Attorney-General of Virginia.

WILLIAM A. ANDERSON,
Attorney-General of Virginia,
FRANK W. CHRISTIAN,
Counsel for Respondents.

160 STATE OF VIRGINIA, }
City of Richmond, } *To wit:*

I, John S. Eggleston, a notary public in and for the city and State aforesaid, do hereby certify that Andrew J. Montague, D. Q. Eggleston, Morton Marye, Asher W. Harman, Jr., and William A. Anderson whose names are signed to the foregoing answer, this day personally appeared before me, in my said city, and made oath that the statements of fact contained in said answer, so far as made upon their own knowledge or information are true and that so far as said statements are made upon information derived from others, they believe them to be true.

Given under my hand this 27th day of November, 1902.

JOHN S. EGGLESTON,
Notary Public.

(My commission expires March 15, 1905.)

161 And thereupon afterwards, to-wit: on the 28th day of November, 1902, the said cause came on to be heard before the Honorable Melville W. Fuller, Chief Justice of the United States, allotted to the fourth circuit and Honorable Edmund Waddill, Jr., United States district judge for the eastern district of Virginia, and was argued by John S. Wise, Esquire, for the complainants and by Frank W. Christian, Esquire, for the defendants.

162 And on the following day, to-wit: the 29th day of November, 1902, the said cause came on again to be heard before the Honorable Melville W. Fuller, Chief Justice of the United States, allotted to the fourth circuit and the Honorable Edmund Waddill, Jr., United States district judge for the eastern district of Virginia,

and was argued by the Honorable W. A. Anderson, the attorney-general for the State of Virginia, for the defendants and John S. Wise, Esquire, and James H. Hayes, Esquire, for the defendants and submitted.

Memorandum of Chief Justice.

Filed November 29th, 1902.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, *vs.* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	No. 1759. In Prohibition.

Application for prohibition, prohibiting defendants from canvassing returns of the election held November 4, 1902, for representatives in Congress, or proceeding to act on the same, and for preliminary order suspending proceedings on the part of the State board of canvassers. The rule heretofore entered herein is discharged, and preliminary order denied. This for want of jurisdiction. The writ is not sought in aid of jurisdiction already acquired; nor does it appear that there is no other remedy.

The proceeding is, in effect, against the Commonwealth,
163 which is in any view an indispensable party, and cannot be made such, and the matter being political, cannot be disposed of in such a proceeding.

Memorandum of Honorable Edmund Waddill, Jr., United States District Judge.

Filed November 29th, 1902.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, *vs.* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	No. 1759.	In Prohibition.

Believing under the decisions of the courts of the United States, by which this court is, and should be governed, that neither of the action now before the court can be maintained, I, for that reason, concur in the result arrived at by the Chief Justice, dismissing the same, and may hereafter file a brief memorandum in writing, embodying my views.

It is, in frankness, due however, that I should say that while I believe that this is the law, as settled by the decisions, it does not entirely embody my personal views as to what that law ought to be. I can but believe that as to rights, arising under, and guaranteed to the citizen by the Constitution and laws of the United States, injuriously affecting one hundred thousand people, whether respecting their property, or their personal or political rights, and
164 particularly the two latter classes, that they ought to be given a day in court; afforded an opportunity for a full and speedy hearing; and to that end, that technicalities, forms and ceremonies should, in large measure, be dispensed with, speedy justice afforded, and the rights of the respective parties litigant ascertained.

And on the 29th day of November, 1902, the following order was entered and filed, to-wit:

Order Discharging Rule and Dismissing Bill.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, vs. ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth; Morton Marye, Auditor of Public Accounts; Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	No. 1759. In Prohibition.

This day came this matter to be again heard on the papers formerly read, and the answer of the defendants to the rule awarded November 15th, 1902, filed November the 28th, 1902, and was argued by counsel,—

Whereupon, the court, for reasons stated in writing, and made part of this order, doth adjudge, order and decree that said rule be and the same is hereby discharged, and for the same reason, the court doth adjudge, order and decree that the prayers of said petition be and the same are hereby denied, and that the same be dismissed, with costs to the defendant.

MELVILLE W. FULLER,
Chief Justice of the United States, Allotted to the Fourth Circuit.

165 *Petition for Writ of Errors.*

Filed January 3rd, 1903.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, *versus* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	No. 1759. In Prohibition.

To the honorable judges of the circuit court of the United States for the eastern district of Virginia:

The petition of William H. Jones, John Hill and Edgar Poe Lee respectfully represents to your honors that they are aggrieved by a decision of this honorable court rendered in the above entitled cause on the 28th day of November, 1902, whereby the court refused to entertain jurisdiction of their petition, and entered a final order dismiss- the same and awarding costs against petitioners.

A copy of the record in the case is hereto attached.

This petition humbly prays for a writ of error from said final decision to the Supreme Court of the United States.

Accompanying this petition are the assignments of error required by the rules of said court, and the bond likewise required by said rules.

All which is respectfully submitted.

PETITIONERS,
By JNO. S. WISE,
JAS. H. HAYES,
Their Attorneys.

166 *Assignment of Errors.*

Filed January 3rd, 1903.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners,
versus
ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.

No. 1759. In Prohibition.

Assignments of error.

On behalf of the petitioners the following assignments of error are filed with their petition for writ of error, as required by rule 35.

First Assignment of Error.

The court erred in holding that the State was a necessary party to this proceeding.

The substance of the prayer was not to compel the State to do anything, but to prohibit officers of the State from violating a plain duty.

Jurisdiction in such cases has been sustained in the Federal court and in the courts of Virginia in many causes.

Second Assignment of Error.

The rights asserted are protected by section 1972 of the Revised Statutes.

The grievance complained of was the attempt of the defendants to subject plaintiffs and others of their class to the deprivation of
167 rights, privileges and immunities secured by the Constitution and laws, under color of alleged statutes, ordinances and constitutions of Virginia, which, as plaintiffs aver, were not lawfully passed and not constitutional if passed.

The jurisdiction in the circuit court, to entertain such a case, is expressly conferred by section 629 of the Revised Statutes. Paragraph 12th of section 629 bestows upon the circuit court jurisdiction of suits to enforce the rights of citizens of the United States to vote in the several States, and paragraph 16th confers jurisdiction of all suits to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of the rights, privileges and immunities secured to the plaintiffs by the Constitution of the United States, by the law providing for equal rights of citizens of the United States.

This particular form of suit is permitted to the petitioners, not only by the language of section 1979 of the Revised Statutes, which authorized them to bring an action at law, a suit in equity or other proper legal proceedings for redress, but by section 722 of the Revised Statutes, whereby it is expressly provided that the jurisdiction in civil matters conferred on the circuit court by the provisions of the title "Civil rights" shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law as modified and changed by the constitution and statutes of the State, wherein the court having jurisdiction of such civil rights is held so far as the same is not inconsistent with the Constitution and laws of the United
168 *States, shall be extended to and govern the United States courts in the trial and disposition of the cause.*

The aforegoing provisions were not modified by the amended jurisdiction act of August 13, 1888, (Supplement to the Revised Statutes, vol. 1, 611). On the contrary, they were expressly preserved intact.

They declare, define, enlarge and modify the jurisdiction of the circuit court, so that it is not lacking by reason of restricting precedents; yet they were utterly ignored and disregarded by the court below; and therein it erred.

Third Assignment of Error.

The court erred in refusing to entertain jurisdiction of the writ of prohibition against the defendants.

The rights of the petitioners which were interfered with are bestowed by the Federal Constitution and statutes. The wrong complained of was perpetrated under color of State constitutions, ordinances and schedules. The Federal court, by the laws, cited above, was empowered, in administering the remedy, to adapt itself, if need be, regardless of antecedent methods of procedure, to the remedies under which the State courts would have proceeded if they had been invoked.

Precedents in the State courts are ample to show that the State courts have exercised the jurisdiction in prohibition in such cases.

It was error to refuse to consider the jurisdiction expressly con-

ferred on the circuit court by section 722, in this class of cases, or to deny its existence, because of some *nisi prius* rulings in cases having no reference to this statute.

169 As was said by Mr. Justice Bradley in Penn. Co. *v.* St. Louis Alton, &c., R. R., 118 U. S. p. —.

"We must not shut our eyes to the fact that new circumstances and conditions, of themselves, require and produce a modification of old rules, or the application of new ones."

Much less must we shut our eyes to new remedies expressly conferred by statute, on the Federal courts, to protect newly recognized rights, and to prevent a flagrant violation thereof.

In 17th Wallace, 445, Railroad Co. *v.* Brown, the Supreme Court, speaking of a grant of railroad privileges by Congress in the District of Columbia, on conditions not to discriminate against blacks, said:

"Congress, in the belief that this discrimination was unjust, acted * * *. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it. It was the privilege of the company to reject it, but to do this it must reject the whole legislation with which it was connected. It cannot accept a part and repudiate the rest. Having therefore constructed its road as it was authorized to do and in this way greatly added to the value of its property, it will be held to be a faithful compliance with all the terms accompanying the grant by which it was enabled to secure this pecuniary advantage."

If the Federal courts feel themselves so moved and empowered to act against a private corporation to enforce conditions not vital to freedom, how much more eager should we find them to compel recusant officials of a State to respect and observe conditions to which the faith of the State is plighted and in consideration of which pledges she enjoys her sovereignty.

170 No writ could be more appropriate to prevent the wrong complained of in the petition.

No writ has been expanded more rapidly in its practical uses, to meet the exigencies of new circumstances and conditions, as the science of law has advanced. None is in more common use to-day in the States of Virginia and West Virginia to accomplish the very purposes sought in this proceeding.

And there was no reason for refusing the writ in this case, under the authority granted by section 722 of the Revised Statutes, except that its use in the Federal courts prior to the enactment of that statute, had been somewhat restricted and technical.

And therein the court erred in its rulings.

It has not been thought proper in framing the aforesaid assignments of error to cite the authorities on which they rest. It seems more appropriate that they shall appear in the brief supporting the points.

And petitioners, by counsel, in view of the importance of this case, will upon the hearing of the cause, petition the honorable, the Su-

preme Court of the United States, for leave to discuss the subject fully and that they be not strictly confined to the specifications of error hereinabove set forth.

All which is respectfully submitted.

PETITIONERS,
By JNO. S. WISE,
Their Attorney.

171 And on the 3rd day of January, 1903, the following order was entered allowing writ of error.

Order Allowing Writ of Error.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM H. JONES, JOHN HILL, and Edgar Poe Lee, Petitioners, *versus* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	No. 1759. In Prohibition.

Ordered by the court this third day of January, 1903, on the petition and assignments of error this day presented to the court, that a writ of error issue to the plaintiff, as prayed, and that the penalty of the writ of error bond is hereby fixed at five hundred dollars, and a certified transcript of the record and all proceedings herein be transmitted to the Supreme Court of the United States.

EDMUND WADDILL, JR., *Judge.*

Writ of Error Bond.

Filed January 3rd, 1903.

Know all men by these presents, that we, Edgar Poe Lee of Richmond, Virginia, as principal, and J. B. Johnson of Manchester Virginia, and E. T. Jenkins of Richmond, Virginia, as sureties, are held and firmly bound unto Andrew J. Montague, governor
172 of Virginia, David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts

of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, in the full and just sum of five hundred dollars to be paid to the said Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3rd day of January, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a session of the circuit court of the United States in and for the eastern district of Virginia in a suit pending in said court, between William H. Jones, John Hill and Edgar Poe Lee, petitioners, and Andrew J. Montague, governor of Virginia, David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, constituting the board of State canvassers of Virginia, respondents, a decree was rendered against the said William H. Jones, John Hill and Edgar Poe Lee and the said William H. Jones, John Hill and Edgar Poe Lee having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Andrew J. Montague, governor of Virginia, David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton
173 Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within twenty days from the date thereof.

Now, the condition of the above obligation is such, that if the said William H. Jones, John Hill and Edgar Poe Lee shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

EDGAR POE LEE. [SEAL.]
J. B. JOHNSON. [SEAL.]
E. T. JENKINS. [SEAL.]

Sealed and delivered in presence of—

JOSEPH P. BRADY,
Deputy Clerk U. S. Circuit Court.

Approved by—

EDMUND WADDILL, JR.,
United States District Judge.

Order to Transmit Record.

In pursuance of the writ of error aforesaid, and *and* according to the statute in such case made and provided, and of the order of the court herein, a transcript of the record and proceedings in the aforesaid cause, together with all things thereunto relating and with the said writ of error annexed is hereby transmitted to the Supreme Court of the United States.

Teste:

M. F. PLEASANTS, *Clerk*,
By JOSEPH P. BRADY, *Dep'y Clerk.*

174 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between William H. Jones, John Hill and Edgar Poe Lee, petitioners and Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of the public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia; and William A. Anderson, attorney general of Virginia, constituting the board of State canvassers of Virginia, respondents, a manifest error hath happened, to the great damage of the said William H. Jones, John Hill and Edgar Poe Lee as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 20 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the third day of January, in the year of our Lord one thousand nine hundred and three.

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States
for the Eastern District of Virginia.

Allowed by
EDMUND WADDILL, JR.,
Judge of the District Court of the United States
for the Eastern District of Virginia.

175 UNITED STATES OF AMERICA, *ss*:

To Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 20 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein William H. Jones, John Hill and Edgar Poe Lee are the plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff- in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., judge of the district court of the United States for the eastern district of Va., this third day of January, in the year of our Lord one thousand nine hundred and three.

EDMUND WADDILL, JR.,
United States District Judge.

176 On this 8th. day of January, in the year of our Lord one thousand nine hundred and three, personally appeared Samuel Bendit, deputy U. S. marshal, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to A. J. Montague, Morton Marye, Asher W. Harmon, Jr., William A. Anderson, on January 6th, 1903, and to David Q. Eggleston, on January 8th, 1903, in the city of Richmond, Va.

SAMUEL BENDIT,
Deputy U. S. Marshal.

Sworn to and subscribed the eight day of January, A. D. 1903.

JOSEPH P. BRADY,
Dep'y Clerk U. S. Circuit Court.

Marshal's Costs.

Fees	$10.00
Expenses	.25
Total	$10.25

177 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Eastern District of Virginia, } ss:

I, M. F. Pleasants, clerk of the United States circuit court for the eastern district of Virginia, do certify that the foregoing is a true transcript of the record and proceedings of the said court, together with all things thereunto relating, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the said court, at Richmond, Virginia, this 8th day of January, A. D. 1903.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk,*
By JOSEPH P. BRADY,
Deputy Clerk.

Endorsed on cover: File No. 18,783. E. Virginia C. C. U. S. Term No. 189. William H. Jones, John Hill, and Edgar Poe Lee, plaintiffs in error, *vs.* Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia, *et al.* Filed January 13, 1903.

(18,784.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 190.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, AND CLARENCE B. GILPIN, APPELLANTS,

vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA; DAVID Q. EGGLESTON, SECRETARY OF THE COMMONWEALTH OF VIRGINIA; MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS OF VIRGINIA, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	2
Exhibit A—Constitution of the State of Virginia, adopted by the convention of 1901-'2 (omitted in printing)	28a	—
B—Schedule (omitted in printing)	93	—
Index to constitution (omitted in printing)	101	—
Index to schedule (omitted in printing)	113	—
C—An ordinance to provide for the registration of voters under the constitution, &c. (omitted in printing)	115	—
Order to show cause	139	18
Marshal's return	142	19
Special and limited appearance for defendants	143	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1903.

	Original.	Print
Order enlarging rule	144	21
Answer of respondents	145	22
Hearing	173	41
Memorandum of Mr. Chief Justice Fuller	174	42
Judge Waddill	175	43
Order discharging rule and dismissing bill	176	44
Petition for appeal	177	45
Assignment of errors	178	46
Order allowing appeal	184	50
Appeal bond	185	50
Citation	187	52
Marshal's return of service	188	52
Clerk's certificate	189	53
Stipulation as to printing record	190	53

1 *Transcript of Record.*

THE UNITED STATES OF AMERICA, *Eastern District of Virginia,* } ss:

At a circuit court of the United States within and for the eastern district of Virginia, begun and held in the court rooms at the custom house, in the city of Richmond, on the first Monday of October, being the sixth day of same month, in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable Edmund Waddill, Jr., judge; Morgan Treat, Esq., marshal, and M. F. Pleasants, clerk.

Among other were the following proceedings, to-wit:

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, and Clarence B. Gilpin, Complainants,

versus

ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Defendants. } In Equity. No. 538.

Be it remembered that afterwards, at the said term, to-wit: on the 14th day of November, 1902, the following bill of complaint and exhibits were filed:

2 *Bill of Complaint.*

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON and Clarence B. Gilpin, Complainants, *versus* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia: Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Defendants.	In Equity. No. 538.

To the honorable judges of said court:

Complaining showeth unto your honors your orators who exhibit this bill on behalf of themselves and all other citizens of the United States who are voters and tax-payers of Virginia, similarly situated with themselves, who may come in and contribute to the costs of this suit, the following cause of action arising under the Constitution and laws of the United States.

First. That complainants and each of whom are, and were at the time of the committing of the grievances hereinafter set forth, citizens of the United States and citizens and residents of the State of Virginia and of the third district of Virginia, as Federal courts are constituted.

Second. That they and each of them are, and were at the time of the committing of the grievances hereinafter set forth, lawful voters of the State of Virginia, and as such entitled to vote for a Congressman for the third district of Virginia, as the congressional districts of said State are now constituted, at a general elec-
3 tion for members of the House of Representatives of the United States, which should have been held, according to law, in the State of Virginia, Tuesday, November 4th, 1902.

Third. That they, and each of them have heretofore, for periods varying from thirty-seven to one year, been citizens, residents and lawful voters of the Commonwealth of Virginia, under article 3, section 1, of the constitution of Virginia, which was ratified by the vote of the people of that State, July 6th, 1869, and under chapter VIII., section 62, of the Code of Virginia of 1887, enacted pursuant thereto by the General Assembly of Virginia in the year 1881 (Acts 1881–'2 c. 203, p. 214).

Fourth. That said constitution became the organic law of the State of Virginia under the following circumstances:

In the year 1861 a convention of the State of Virginia passed an ordinance of secession, under which it was attempted to secede from the Federal Union, and to establish new political relations with other States under a new and distinct political compact known as the Confederate States of America. The persons filling the executive, legislative and judicial offices of Virginia, at the time said ordinance was passed, transferred their allegiance from the United States to the Confederate States and organized armed resistance to the authority, jurisdiction and sovereignty asserted over Virginia by the United States.

A war between the forces of the United States and Confederate States ensued, lasting over four years, during the progress of which elections occurred in Virginia from time to time, under a civil government which acknowledged allegiance to the Confederate States of America, so that prior to the termination of said war, not only had the form of government existing in Virginia before the outbreak of said war disappeared, but the incumbents of all the offices in the State were persons elected while they were under
4 a government and allegiance hostile to the United States.

The armed forces of the Confederate States and of Virginia were conquered by the forces of the United States in the year 1865, and the persons holding the offices under the civil government of the State fled, and the government administered by them was destroyed upon the occupation of the capital and territory of Virginia by the armies of the United States.

The only actual government in Virginia from that time forth until the year 1870 was one of military occupation, or appointive civil government, subject to military control both under the authority and terminable at the pleasure of the Congress of the United States.

The Congress of the United States passed, during the period aforesaid, a series of acts known as the reconstruction acts, framed upon the theory that, after the conquest of Virginia, no republican form of government existed in Virginia, and that it was the duty of the United States to make good to the State the constitutional guarantee of a republican form of government. By one of said acts the people of Virginia were permitted to assemble, frame a constitution, and submit it to Congress, after the legislature elected when said constitution was voted upon had assembled and ratified the amendments known as the fourteenth and fifteenth amendments to the Constitution of the United States. Pursuant to that authority, the people of Virginia met in convention, framed a constitution, ratified it by popular vote July 6, 1869, and elected a legislature; and that legislature met, ratified said constitutional amendment and adjourned until the Congress of the United States should decide and determine whether the constitution adopted as aforesaid was satisfactory.

5 Among other provisions of said constitution were the following:

"Art. III.—Elective franchise and qualifications for office.

SEC. 1. Every male citizen of the United States twenty-one years old, who shall have been a resident of this State twelve months, and of the county, city or town in which he shall offer to vote three months next preceding any election, shall be entitled to vote for members of the General Assembly and all officers elected by the people."

The only classes of voters excluded by said constitution from exercising the right of franchise were:

1. Certain designated officers, soldiers, seamen or marines.
2. Idiots and lunatics.
3. Persons convicted of bribery in elections, embezzlement of public funds, treason, felony or petty larceny.
4. Persons who had fought a duel, or sent or accepted a challenge, &c.

The Congress of the United States, by an act passed January 26, 1870 (16 U. S. Stat. at Large, p. 62), after a debate upon said proposed constitution, allowed Virginia to resume her relations to the United States and to send representatives to Congress under said constitution, upon certain fundamental conditions, among which was the following:

"That the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States, of the right to vote who are now entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law."

And subject to said conditions which she expressly accepted, under which she has acted for over thirty years, and which she is now estopped from denying or questioning, the State of Virginia was permitted to resume her relations to the United States and to exercise all her ancient sovereign rights, save as they were curtailed, surrendered and limited by her assent to the fundamental conditions aforesaid.

6

Fifth. Said constitution of Virginia, adopted in 1869, provides among other things, as follows:

"Article XII.—Future changes in the constitution.

"SEC. 2. At the general election to be held in the year 1888, and in each twentieth year thereafter, and also at such time as the General Assembly may by law provide, the question, 'Shall there be a convention to revise the constitution and amend the same?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such convention: Provided, that no amendment or revision shall be made which shall deny or in any way impair the right of suffrage, or any civil or political right as conferred

by this constitution, except for causes which apply to all persons and classes without distinction."

Sixth. Complainants, having freedom and the right of suffrage guaranteed to them by the thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States; by the fundamental conditions of the act of Congress of January 26, 1870; by the constitution of Virginia, adopted in 1869, and by the law of Virginia of 1881, above cited, have hitherto continuously enjoyed said franchise uninterruptedly until November 4th, 1902. They can read and write, are owners of real and personal property in Virginia; have a visible permanent interest in, and identify with, the State, in which they were born or have resided the greater portion of their lives, and have committed no offense, and are colored citizens.

7

Seventh. In the year 1900 a political party called the Democratic party, held complete control of the executive and judicial offices of Virginia and a large majority in both branches of the legislative department. Being so in control, the Democratic majority of the General Assembly passed an act, approved March 5th, 1900, submitting to the people of Virginia the question, "Shall there be a convention to revise the constitution and amend the same?" at a general election to be held upon the fourth Thursday in May, 1900.

Eighth. Complainants aver that in every method and by all the representative utterances through which political parties give pledges, the Democratic party of Virginia assured the voters of Virginia that if they voted in favor of said convention any revised and amended constitution which might be framed thereby would be submitted to the voters of Virginia for ratification or rejection. And they verily believe and charge that a vast majority of those who voted in favor of said convention were induced thereto by these assurances given by every representative politician, by the press and by party conventions of all political parties in the State.

Ninth. At the election held in May, 1900, the popular vote favored said convention, and was duly certified to the next General Assembly, which passed an act February 16, 1901, reciting that it was then proper to provide plans for the selection of the delegates to such convention, for the convening of said delegates and the organization of the State convention and for submitting the revised and amended constitution to the people of the State of Virginia for ratification or rejection.

Provision was made by said act for electing delegates to said convention on the fourth Thursday in May, 1901, and for the assembling of the convention June 12, 1901; and the act further provided that if the convention completed its work before October 5, 1901, the constitution framed by it should be submitted to the qualified voters of the Commonwealth as a whole, or by separate articles or sections, as the convention might determine, for ratification or rejection, at the general election to be held November 5, 1901; and that if the work of said convention was not finished

8

before October 5, 1901, it should remain for the next General Assembly to enact such measures as it should deem proper, for submitting the said constitution to the people of the State for ratification or rejection.

Tenth. Said convention assembled June 12, 1901, and pretended to organize, but a majority of the delegates elected thereto then and there refused to take or subscribe any oath of office in violation of art. III., sec. 5, of the constitution of Virginia, and no member of said convention ever qualified as such.

Whereby, as complainants insist and charge, all the proceedings of said convention were null, void and of no effect.

Eleventh. Nevertheless, said convention did attempt to act and remained in session until June 26, 1902, when it adjourned *sine die*, after pretending to ordain a constitution consisting of sixty-five pages of printed matter, eight pages of schedules and twenty-four pages of registration ordinances, all of which are hereto annexed as part thereof, marked Exhibit- A, B and C.

Twelfth. Notwithstanding the political pledges above referred to, and the requirements of the act of assembly aforesaid, that the work of said convention should be submitted to the voters of Virginia for ratification or rejection, a bare majority of a quorum of said convention, consisting exclusively of Democrats, refused to submit the said proposed revision and amendment of the constitution to
9 the people of Virginia, or to leave the manner of its submission for ratification or rejection to the next General Assembly of the State.

The proposition to submit the amended and revised constitution to the electorate as constituted under the laws theretofore in force, was rejected by a vote of—ayes, 33; noes, 52.

The proposition to submit it to the electorate provided for in said revised and amended constitution, was rejected—ayes, 24; noes, 58.

And the proposition, "Shall the constitution framed by this body be ordained by this convention?" was sustained by a vote of—ayes, 47; noes, 38.

The affirmative vote by which this outrage was perpetrated was less than a majority of the whole convention.

Fort*h*-seven members attempted, in violation of every pledge given by their party; without any constitutional or statutory authority to act definitively; in defiance of the law under which they were assembled, to impose upon the voters of Virginia as the organic law of the State a constitution embodying many subjects never theretofore embraced in any constitution of Virginia; never submitted to the voters of Virginia for their approval, and framed and intended to disfranchise two-fifths of the voters, who elected the delegates to the convention, or as many as the appointed agents of said dominant faction should thereafter see fit to deprive of suffrage.

Thirteenth. The design last referred to is manifest in sundry devices inserted in said constitution under pretence of guarding the electoral franchise as follows:

Under the constitution and laws of Virginia, as they existed

when said convention was assembled, the lawful voters of Vir-
10 ginia, that is to say, every male citizen of the United States, twenty-one years of age, who had been a resident of the State of Virginia twelve months, and of the county or town in which he offered to vote three months next preceding any election, was entitled to vote, provided he was duly registered.

The registration laws of the State of Virginia then in force provided for a registrar in every election district of all the counties and cities of the State, who held his office for a fixed term, which had not expired when said convention attempted to enact the unlawful measures hereinafter stated. Any voter of the Commonwealth might apply to said registrars for registration, and they were required annually, in May and October, to designate a time and place at which lawful voters might be registered.

Your orators aver and charge that the dominant faction in said convention wilfully and deliberately planned to destroy the electorate fixed by the then existing constitution of Virginia, and to that end it attempted to repeal the registration law above named, without submitting such action to the people, and contrary to the powers of said convention.

After incorporating into the proposed constitution, as article I. thereof, a bill of rights, which is a mockery of the liberties recited, when contrasted with what follows it, said convention, under article II., headed, "Elective franchise and qualifications for office," attempted to define and fix the qualifications of electors. Pretending to give a vote to every male citizen of the United States, resident in Virginia, twenty-one years of age, said section increased the term of residence — voters in the State to two years, and in the county, city or town to one year, and in the precinct where the citizen offers to vote to thirty days. To those primary quali-
11 fications it added requirements that such voters should be registered and should have paid a State tax. Superadded to these and annulling said pretended broad grant of franchise, was the requirement that there should be a new general registration in all the counties, cities and towns of the State during the years 1902 and 1903 at such times and in such manner as might be prescribed by an ordinance of said convention.

In violation of all precedent or authority, and contrary to law, the dominant faction in said convention thereupon, or shortly thereafter, passed an ordinance entitled, "To provide for the registration of voters under said constitution and prior to the year 1904," by the provisions of which registration was ordered, not in the voting districts as provided by the laws of Virginia then in force, but in the several magisterial districts of every county and in the wards of every city, thereby changing the territorial areas of registration districts and increasing the physical difficulties of registration.

It provided that said general registration should take place prior to the 15th day of October, 1902, and again prior to the 15th day of October, 1903; that the registrars should consist of a board composed of three citizens resident in such district or ward appointed by said

convention; whereby it undertook to change the time for holding registrations, the appointing power and the number of registrars. It restrained said boards from registering any persons who applied for registration, except those entitled to register under said constitution prior to January 1, 1904, and gave said boards power to administer oaths and examine under oath any applicants and witnesses; to receive evidence and hear testimony touching qualifications for registration. It further made the act of the majority of the board
12 the act of the board itself. It provided for the delivery of the lists of persons so registered to the judges appointed at such precinct to conduct said election, and provided for the prosecution of any person examined by said boards for perjury. It gave the right of appeal to a rejected voter to the county or corporation court, and thence to the supreme court of appeals, and after sundry other detailed provisions, in order to make more effectual the plans of disfranchisement settled upon by the dominant faction, it descended to the appointment of three designated individuals in every magisterial district of the counties and in every ward of the cities in the Commonwealth of Virginia, who could be relied upon as partisans of said faction to carry out its plans, whereby none but the persons whom it intended should be registered and allowed to vote would be placed upon the registration lists in any magisterial district or ward of the State of Virginia.

With the machinery thus provided and registration exclusively under control of its appointees, the dominant faction in said convention enacted into the constitution itself that its appointees should only register such voters of Virginia as presented themselves to them and were citizens of the United States having the qualifications of age and residence aforesaid, and possessing the following additional qualifications:

(1) Certain soldiers; (2) any son of such soldier; (3) owners of property, upon which, for the year next preceding that in which they offered to register they had paid at least one dollar of State taxes; (4) persons able to read any section of said constitution submitted to them by said officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, were able to understand and give a reasonable explanation thereof when read to them by the officers.

13 Fourteenth. Complainants aver that the language aforesaid, purporting that every male citizen of the United States, as provided in the constitution of 1869 and required by the fundamental conditions of the act of Congress should be admitted to register, was a mere pretence of granting the right to register, coupled as it was, with the proviso that such right should only exist when the applicant possessed the other qualifications last hereinabove named. The act of Congress hereinabove cited expressly forebade the curtailment of the right of suffrage in that manner. So also do the fourteenth and fifteenth amendments to the Constitution of the United States. So also does the constitution of Virginia of 1869, and the laws enacted pursuant thereto. The first and second condi-

tions aforesaid were plainly obnoxious to that clause of the bill of rights, which forbids the granting of separate privileges to any man, or set of men, or granting privileges as descendible for service of an ancestor.

The third condition relating to the ownership of property on which taxes had been paid for the preceding year was likewise unconstitutional and void.

The fourth proviso, whereby the right of any citizen to exercise his franchise in Virginia was made dependent upon the judgment or caprice of partisan appointees, violated every idea of democratic constitutional liberty.

The autocrat of the Russian Empire has no more absolute mastery over the political forces of his empire and is no more potent to control the membership and organization of every representative body in his realm, or the incumbency of every office in his dominions in perpetuity, than has the dominant faction of said convention in Virginia, if said ordinance and constitution are valid.

Fifteenth. The schedule by which it was sought to put said
14 pretended constitution into effect provided that certain lawful electoral boards existing in Virginia prior to the convening of the said convention, and to which electoral boards the appointment of judges of election and registration was delegated, should remain in office until March 1, 1904, with the powers conferred by existing laws, except the appointment of registrars.

Said schedule further provided that, in all elections held after said pretended constitution went into effect, the qualifications of electors should be those required by the article II. of said pretended constitution therein set forth.

It further provided that said constitution should go into effect on the 10th day of July, 1902, at noon, and directed the governor of Virginia to immediately issue his proclamation, announcing that said revised and amended constitution had been ordained by the people of Virginia, assembled in convention, through their representatives, as the constitution for the government of the people of the State, and that it would go into effect as such, subject to the provisions of said schedule, on the 10th day of July, 1902, and to call upon the people of Virginia to render their true and loyal support to the same as the organic law of the Commonwealth.

It required that when the General Assembly convened on the 15th day of July, 1902, as it had been summoned to convene, its members and officers, before entering upon the discharge of their duties, should severally take and subscribe the oath or affirmation prescribed by section 34 of said constitution, which was an oath to support the Constitution of the United States and the constitution of the State of Virginia, ordained by the convention which assembled in the city of Richmond on the 12th day of June, 1901.

It further required that the governor of Virginia, and all
15 other executive officers of the State, whose offices are at the seat of government, and all judges of courts of record, should

severally take and subscribe such oath or affirmation, under a penalty of vacation of their offices.

Sixteenth. Complainants are advised that the governor of Virginia, did forthwith make proclamation as directed by said schedule, and that the governor of Virginia, Andrew J. Montague, and all the other executive officers of the State, whose offices are at the *seta* of government, and all the judges of courts of record, took and subscribed the oath required by said schedule, whereby they undertook to support the said alleged constitution; and that the members of the General Assembly, when it assembled on the 15th day of July, 1902, with one or two exceptions, took and subscribed said oath.

Seventeenth. Complainants aver that the passage of said ordinance creating said boards of registration; the appointments by said convention of the individuals composing said registration boards; the attempted additional qualifications upon the right of suffrage set forth in article II., section 19, of said pretended constitution, and especially said fourth qualification; and the attempts to ordain and proclaim said constitution without submitting it to the people of the State, are each, all and every one of them in violation of the rights of complainants, destructive of complainants' franchises, ruinous to complainants' property as placing them subject to the control of a spurious and false electorate; in violation of the XIVth and XVth amendments of the Constitution of the United States; in violation of the act of Congress of January 26, 1870; and in violation of the only existing constitution of Virginia, which was ratified by the people of Virginia July 6th, 1869, and the laws enacted pursuant thereto; and that each, all and every one of
16 said attempted acts, ordinances, appointments, constitution and schedule are null, void and of no effect.

Eighteenth. Complainants aver and charge that by means of the premises the governor of Virginia and all other executive officers of the State, the judges of the courts of record of said State, and the members of the General Assembly of said State, have united in an attempt to abandon the government of Virginia under which they were elected to office and that they and each of them have, in violation of their duties to the people who elected them, and in conspiracy with the dominant faction in said convention, attempted to ordain and proclaim said constitution and to impose the same upon the people of Virginia contrary to their will, without giving them an opportunity to be heard, well knowing they would never ratify the same, and in violation of the Constitution and laws of the United States and of the State of Virginia.

Nineteenth. They further aver and charge, and, if permitted to do so, will prove, that many of the members of the said convention, who voted in favor of ordaining and proclaiming said constitution, boldly avowed the purpose in framing the same, to disfranchise the great body of the colored voters of Virginia; and that however cunningly the devices contained in said instrument may be concealed, the real purpose of the dominant faction which framed and pro-

mulgated said so-called constitution was to disfranchise the colored voters of Virginia on account of their race and color, a purpose which will be fully accomplished unless restrained.

Twentieth. They further aver and charge, and, if permitted to do so, will prove, that members of the dominant faction in said convention, who voted in favor of ordaining and proclaiming said so-called constitution, openly and boldly declared that they knew said constitution would never be ratified and approved by
17 the voters of Virginia, if it was submitted to them for ratification or rejection, and that in voting to ordain and proclaim the same they did so, knowing full well that by that means alone if at all, could said constitution be imposed upon the people of Virginia.

Twenty-first. Complainants are further advised and charge that the government of Virginia having passed, by the methods above recited, from under the lawful constitution adopted by the people in the year 1869 to a government under said so-called constitution, the government now existing in Virginia is unlawful, notwithstanding many of the incumbents of office therein were lawfully elected to the offices which they hold.

Twenty-second. After the governor of Virginia had proclaimed said constitution, and the other executive officers and judges of courts of record and members of the General Assembly had attorned to said so-called new constitution, as hereinabove set forth, the registration boards appointed by the ordinance of said convention held their sessions and made up their enrollments in the various magisterial districts and wards of the Commonwealth. These complainants aver and charge, and, if permitted to do so, will prove, that in every section of the State of Virginia the action of said registration boards was as partisan and unconstitutional and outrageous as might have been expected under the circumstances of their appointment; that said boards hastened in many sections of the Commonwealth to place upon said registration rolls the names of every white male citizen of the United States possessing the qualifications of age and residence, and who was believed to be a Democrat; that the said boards made little or no effort to ask such white persons to read any section of said constitution or to give a reasonable explanation of the same, but quickly and cheerfully
18 admitted all such to registration; that said boards, on the contrary, only permitted colored voters to apply for registration at stated times and places, and that when such colored persons presented themselves said boards proceeded at once to ask complicated, difficult and unnecessary questions, and that even in cases where such questions were answered intelligently, applicants for registration were rejected by said boards, they holding that the answers and explanations given by them were not reasonable; and complainants aver that by means of the premises, thousands of lawfully qualified citizens of Virginia, who applied for registration to said registration boards, have been rejected by them, and that many other thousands of voters either refused to recognize said boards as lawfully con-

vened, or were deterred from applying to them by their notoriously partisan and arbitrary exercise of the unconstitutional powers entrusted to them.

Twenty-third. Complainant William S. Selden, colored age fifty-five, born in Richmond, lived here all his life. The election held November 4th, 1902, was the first election ever held in Richmond since petitioner became of age, at which he has missed a vote. Petitioner can read and write. Is engaged in business as an undertaker or funeral director on his own account, and his capital invested in said business worth about $2,000: owns and pays tax on real estate valued at about $1,500, which amount he has accumulated since his emancipation in 1865; lives in Jackson ward; applied for registration to the board of registration in Jackson ward about September 25th or 26th; was interrogated by the board concerning the duties of the governor under the new constitution, and informed that his answers were unsatisfactory, and he was refused registration; did not appeal because he did not believe he was bound to appeal or that he would get justice if he did.

19 Complainant Wm. H. Anderson, colored, aged forty-three, born in Virginia, resided here all his life; has lived in Richmond thirty years, and voted here ever since he was of age; can read and write; served in Spanish-American war as second lieutenant of Company C, Sixth Virginia infantry, and as regimental adjutant; is engaged in business as manufacturers' agent, and for thirteen years engaged as a keeper of a book and stationery store; applied for registration to registration board of Jackson ward September 16, 1902, they pretended to register him; registrars pretended to copy his name from his honorable discharge, exhibited to them; when petitioner offered to vote on election day he was rejected, although the election judges knew him personally, because he was registered as William A. Anderson; his description, in other respects, as to residence, age, etc., being correct; offered to be sworn as to his identity, but judges refused him; tried to find judge of corporation court, to obtain redress; found judge was out of town.

Complainant Clarence B. Gilpin, colored, age, 21; born in Richmond; lived there all his life; can read and write; graduated at Richmond normal school in 1898, after ten continuous years at Virginia public schools; clerk of an insurance company; lives in Jackson ward; applied about September 15, 1902, to registration board of Jackson ward; was examined by registration board concerning his understanding of section 141 of the new constitution, and rejected because board said his answers were unsatisfactory; appealed to the judge of corporation court and was informed his appeal was filed too late.

Twenty-fourth. Whereby, as complainants aver, the registration lists made up by said registration boards appointed by the said convention became, and were not only the unlawful registration lists of the congressional electorate of Virginia; but are, as they

20 were intended to be, by the faction which designated said registration board-, merely partisan partial lists of the lawful

electorate, containing only such names as the appointees of said convention saw fit to enroll, and excluding lawful electors of Virginia to the number of at least 100,000 in the State and in this congressional district.

Twenty-fifth. Under the laws passed by the Congress of the United States and lawfully enacted in Virginia prior to the assembling of said convention, of the State of Virginia, an election for Congressman from the ten congressional districts of Virginia should have been held in the State of Virginia upon Tuesday, November 3rd, 1902. By reason of the unlawful conspiracy aforesaid between the lawfully elected officers of Virginia, and the dominant faction in said convention, and its appointees, no such election was held. Writs of election were issued by the governor of Virginia, in the manner prescribed by law, but in taking such action he pretended to act under the Constitution unlawfully proclaimed by him as aforesaid. Judges of election at the several voting precincts of the State of Virginia were appointed for said election by the electoral boards of their several counties and cities, but the electoral boards and judges aforesaid did not take the oath to support the lawful constitution of Virginia, and only took the oath to support said spurious constitution; and whatever color of authority said electoral boards may have had to appoint said judges, by reason of their having been selected prior to the attempted proclamation of said constitution, said attempted elections were null, void and of no effect, for the further reason that the lawfully registered voters of the Commonwealth were denied the right of suffrage, and the lawfully enrolled registration lists were excluded from said elections, and, on the contrary, the only regis-
21 tration lists used by said judges, or upon which any applicant for the right to exercise suffrage was permitted to vote, were spurious and unlawful registration lists made up by the illegal and partisan registration boards designated by the ordinance of said convention; whereby said elections for representatives in Congress were conducted in violation of the laws of the State of Virginia in all respects, without the registration lists required by law; without the officers conducting same having taken the oath required by law; and were and are null, void and of no effect.

Twenty-sixth. At said election the candidates for Congress in the third congressional district aforesaid were as follows:

John Lamb was the candidate of the Democratic party, and Wm. E. Talley and B. W. Edwards were the candidates of the Republican party. The votes cast at said pretended election were not published, but whatever the said pretended returns of votes cast may be, it was a foregone conclusion before said illegal election was held, that said Democratic candidate would receive a very large vote, and said Republican candidate would receive a very small vote, because by the partisan and unlawful methods by which the registration lists were made up the Democratic voters in the district were placed upon said lists and as many Republican voters

were excluded therefrom as the partisan registration boards saw fit to exclude.

Twenty-seventh. Under the laws of Virginia enacted prior to the convening of said convention, and still recognized as in force by the schedule of said convention, the governor of Virginia, the secretary of the Commonwealth, the auditor of public accounts, the State treasurer and attorney-general, or any three of them, are constituted a board of State canvassers. The present incumbents
22 of these offices are as follows, to-wit:

Andrew J. Montague is the governor of the State of Virginia; David Q. Eggleston, secretary of the Commonwealth; Morton Marye, auditor of public accounts; Asher W. Harman, Jr., State treasurer, and William A. Anderson, attorney-general.

After each election the judges of each voting precinct are required by law to make up the returns of the vote cast in their respective precincts, and transmit them to the clerk of the county or corporation in which the election is held. The electoral board of each county and city, when it appoints election judges, designated five of the persons so appointed to act as commissioners, who, or any three of whom, constitute a board, of which the clerk of the county, corporation or hustings court is *ex officio* clerk. These commissioners meet at the clerk's office of their respective counties or corporations on the second day (which in this case is Thursday, November 6th) after the election, and upon the returns made at the clerk's office, said commissioners ascertain from the returns the persons who have received the greatest number of votes in the county or corporation for the several offices to be filled at said election. The clerk is required to make out abstracts of the votes, and said abstracts certified and signed by said commissioners and attested by the clerk, are deposited in the clerk's office, and certified copies thereof, under the official seal of the clerk, are transmitted to the secretary of the Commonwealth.

In the case of elections for representatives in Congress, the secretary of the Commonwealth, upon receipt of the certified abstracts of the votes given in the several counties and corporations constitut-
23 ing a congressional district, is required to proceed to open the same and record them in a suitable book, and to preserve in his office said abstracts for the purpose of canvassing the results of elections.

Said board of State canvassers is required to meet at the office of the secretary of the Commonwealth on the fourth Monday in November after the election (which, in the present year, is Monday, November the 24th) when, upon the certified abstracts on file in the office of the secretary of the Commonwealth, it is required to proceed to examine and make statement of the whole number of votes given at such election for representatives in Congress, which statement shall show the names of persons for whom such votes have been given for said office, and the whole number given to each, distinguishing the several districts, cities and counties in which they were given; it is also required to certify the said statement to be

correct and the members of said board must subscribe their names thereto, and said board is required to thereupon determine what persons have been, by the greatest number of votes, duly elected Congressmen from the ten several congressional districts of Virginia, and to endorse and to subscribe on such statements a certificate of such determination, and deliver them to the secretary of the Commonwealth. The secretary of the Commonwealth is required to record in a suitable book each certified statement or determination as made by the board of State canvassers, and without delay make out and transmit to each of the persons thereby declared to be elected a certificate of his election certified by him under his seal of office.

Twenty-eighth. Complainants charge that each, all and every one of the proceedings had and taken by the governor of Virginia, the secretary of the Commonwealth, the several electoral
24 boards in the State of Virginia, the judges and clerks of election, and all the other officers, to whom duties concerning elections are committed by the laws of Virginia, have, in so far as they relate to the election required by law to be held in the State of Virginia November 3, 1902, for representatives in Congress of the United States, been null, void and of no effect; that each, all and every one of said proceedings have been contrary to the law, in violation of complainants' rights, and unconstitutional, and that no election for representatives in Congress was held in the State of Virginia November 3, 1902.

Twenty-ninth. Nevertheless, complainants are advised that the judges of election appointed in and for the several election precincts in all the congressional districts of Virginia did pretend to hold such an election November 3rd, 1902; that said precinct judges did certify to the clerks of their respective counties the votes which were cast thereat on the day aforesaid; that the board of canvassers in the several counties and cities in said several congressional districts did assemble at their respective court-houses upon the 6th day of November, 1902, and did certify abstracts of the votes cast in their counties and cities respectively to the secretary of the Commonwealth at Richmond, Virginia, and that said board of State canvassers will assemble at the capital upon the 24th day of November, 1902, and will then and there, unless restrained from so doing, proceed to treat said pretended election as if it were a lawful election, and will from the spurious certified abstracts on file in the office of the secretary of the Commonwealth proceed to examine and make up statements of the whole number of votes given at said spurious election for representatives in Congress, and to certify such statements to be correct, and to subscribe their names thereto; and to determine what persons had been by the greatest number of votes duly elected to such offices, and to endorse and sub-
25 scribe on such statement a certificate of such determination and to deliver them to the secretary of the Commonwealth; and that said secretary of the Commonwealth will, unless restrained from so doing, record said certified statement of determination, and without delay make out and transmit to each of the per-

sons thereby declared to be elected false and spurious certificate of his election as a representative in Congress, certified by him under his seal of office.

Thirtieth. Complainants aver and charge that such action on the part of said board of State canvassers would do them great and irreparable injury; that the injury to them is great because the action of said board of State canvassers, if permitted to be taken, will give effect as laws to enactments, proclamations and proceedings, which control and govern their persons and their properties, their liberties, their franchises and immunities, which enactments, proclamations and proceedings have never been and are not valid or binding upon complainants, or upon any citizens of Virginia That said injury is irreparable, because it is of such a character that, unless it is restrained it can never be repaired. Complainants are freemen and voters and tax-payers in their community, and the damage done to them by these spurious and invalid proceedings, which deprive them of their franchises, take away the liberty guaranteed to them by the Constitution of the United States, and give them no voice in the Government which taxes them, is an injury which is irreparable even if it should be permitted to exist for a single minute.

Forasmuch as complainants are remediless in the premises, save in a court of equity, wherein such matters as are hereinabove set forth are properly cognizable and relievable, therefore com-
26 plainants pray that Andrew J. Montague, the governor of Virginia, David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., State treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, and constituting the board of State canvassers as defined in the Code of Virginia, 1887, section 139, be made parties defendant to this bill and duly summoned to answer the same, that this honorable court shall examine into and determine whether the said pretended constitution of Virginia, passed by the convention which assembled at Richmond on July 12th, 1901, and the schedule thereto annexed, and the ordinance passed by said convention entitled, "An ordinance to provide for the registration of voters under this convention prior to the year 1904," and the proclamation of the governor of Virginia based thereon, and the subsequent proceedings of the executive, judicial and legislative departments of Virginia, based thereon, or any of them, are or ever have been lawfully enacted, or have become obligatory and binding upon the people of Virginia, and whether, even if said constitution, schedule and ordinance were enacted according to the forms of law, they are not, nevertheless, null, void and of no effect, as contrary to the Constitution and laws of the United States; that this honorable court having decided that the said laws are null, void and of no effect, and that any election held under them is likewise void will perpetually restrain and enjoin said State board of canvassers and each and every member thereof from considering or passing upon the returns of said pretended election held November the 4th, 1902, in the State of Vir-

ginia for representatives in Congress, the same not having been held in accordance with law and being null, void and of no effect; and that the said board of State canvassers be perpetually
27 restrained from passing upon said returns; and that the secretary of the Commonwealth be perpetually restrained and enjoined from making out or transmitting to any of the persons who were candidates for election for the House of Representatives of the United States at a pretended election held in Virginia November 4th, 1902, any certificate of election certified by him under his seal of office; and inasmuch as the final determination of said questions by this honorable court may be delayed beyond the 24th day of November, 1902, complainants pray for a restraining order against said board of State canvassers, and each and every member thereof, in the nature of a temporary injunction, forbidding them and each of them from taking any proceedings whatsoever upon the certified abstracts of returns of said election in the office of the secretary of the Commonwealth of Virginia, until the further order of this court can be had in this cause. And for all such other, further and general relief in the premises as to equity and your honor may seem meet and proper under the circumstances.

WILLIAM S. SELDEN.
WM. H. ANDERSON.
CLARENCE B. GILPIN.

STATE OF VIRGINIA, *City of Richmond,* } *To-wit:*

This day personally appeared before me, the undersigned, deputy clerk of the United States circuit court for the eastern district of Virginia, William S. Selden, Wm. H. Anderson and Clarence B. Gilpin, whose names are signed to foregoing petition, bearing date 14th day of November, 1902, who, being by me duly sworn, made oath that the acts set forth in said petition, so far as stated as of their own
28 knowledge are true, and so far as the same are stated upon knowledge derived from others, they believe them to be true.

Witness my hand and official seal this 14th day of November, 1902.

JOSEPH P. BRADY,
Deputy Clerk, United States Circuit Court.

(Exhibits A, B & C, being constitution, schedule and ordinance, are omitted in printing per stipulation of counsel. See side page 190.)

139&140 And on the 15th day of November, 1902, the following order was entered and filed, to-wit:

Order to Show Cause.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM SELDEN, WILLIAM H. ANDERSON, and CLARENCE B. Gilpin, Complainants,
vs.
ANDREW J. MONTAGUE, Governor of Virginia; DAVID Q. EGGLESTON, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.

This day came the complainants by their attorneys, John S. Wise and James H. Hayes, and exhibited their bill of complaint and exhibits against Andrew J. Montague, governor of Virginia, David Q. Eggleston, secretary of the Commonwealth of Virginia, Morton Marye, auditor of public accounts of Virginia, Asher W. Harman, Jr., treasurer of State of Virginia, and William A. Anderson, attorney-general of Virginia, constituting the board of State canvassers of Virginia, praying for an injunction against the defendants restraining and enjoining them as the board of State canvassers of Virginia from considering or passing upon the returns of an election held November 4th, 1902, in the State of Virginia for representatives in Congress, on the ground that the said election was not held in accordance with the law, and was null, void and of no effect; also praying that the secretary of the Commonwealth be per-tually restrained and enjoined from making out or transmitting to any persons who were candidates for election to the House
141 of Representatives of the United States at an election held in Virginia November 4th, 1902, any certificate of election certified by him under his seal of office, and also praying for a restraining order against said defendants in the nature of a temporary injunction, forbidding them and each of them from taking any proceedings whatsoever upon the certified abstracts of returns of said election in the office of the secretary of the Commonwealth, until the further order of this court; and for general relief.

Whereupon, it is ordered that each, all and every of said defendants, to-wit: Andrew J. Montague, governor of Virginia, David Q. Eggleston, secretary of the Commonwealth of Virginia, Morton Marye, auditor of public accounts of Virginia, Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, constituting the board of State canvassers of Virginia, be and they are hereby summoned to appear

before this court at Richmond, Virginia, on the 20th day of November, 1902, at 11 o'clock, a. m., to show cause, if any they have or can show, why the temporary restraining order prayed for in said bill in the nature of a temporary injunction, should not be granted against them and each of them in accordance with the prayers of said biil.

Ordered further that the complainants cause copies of said bill and of this order to be served upon each of said defendants on or before the 17th day of November, 1902, but not copies of said exhibits, they being public documents, which are accessible to the said defendants.

EDMUND WADDILL, JR.,
U. S. Judge.

142 *Marshal's Return.*

I certify that I this day delivered a true copy of the petition in the above case, together with a true copy of the above order, upon the following named defendants: Andrew J. Montague, governor of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia.

MORGAN TREAT,
United States Marshal, Eastern District of Virginia.

Richmond, Virginia, November 15th, 1902.

And further executed on the 17th day of November, 1902, by delivering a true copy of the petition in this case, together with a true copy of the order therein, upon the following named respondents: David Q. Eggleston, secretary of the Commonwealth, in person at his office in this city (Richmond, Virginia); and by delivering a true copy of said petition and order to Mrs. William A. Anderson, wife of William A. Anderson, attorney-general of Virginia, at his residence 301 E. Franklin street, Richmond, Virginia, and explaining the same to her, Mr. Anderson being absent from the city.

MORGAN TREAT,
United States Marshal,
By M. A. COLES,
Chief Office Deputy.

143 *Special and Limited Appearance of Defendants.*

Filed November 20th, 1902.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, and Clarence B. Gilpin, Complainants, *versus* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggeston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Defendants.	In Equity. No. 538.

We, the undersigned attorneys at law, hereby appear in behalf of the respondents in the above-named cause, for the purpose of objecting to the jurisdiction of this court to entertain the said cause, or to make any order therein against the respondents, and for that purpose alone; and, without waiving the objection to the jurisdiction of this court or the said limited and special appearance, but insisting thereon, the undersigned move the court to enlarge the rule heretofore issued in this cause, which was made returnable to this day, until Friday, the 28th day of November, 1902, at eleven o'clock a. m., in order that the said respondents may have further time to make answer to said rule. And this appearance is made specially and solely for the purpose of objecting to the jurisdiction of this court in said cause, and for no other purpose whatsoever; and said motion for the enlargement of said rule is in no way intended to waive the objection to the jurisdiction of this court, or to impair the special and limited character of this appearance.

WILLIAM A. ANDERSON,
Attorney-General of Virginia.
FRANK W. CHRISTIAN,
Counsel for Respondents.

144 And on the 20th day of November, 1902, the following order was entered and filed:

Order.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, and Clarence B. Gilpin, Complainants, *versus* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Defendants.	In Equity. No. 538.

This day came the respondents, by their attorneys, William A. Anderson, attorney-general of Virginia, and Frank W. Christian, and entered their special and limited appearance for the purpose of objecting to the jurisdiction of this court in this cause, and for no other purpose.

And, not waiving their said special appearance, the attorneys for the respondents moved the court to enlarge the rule hereinbefore granted until Friday, the 28th day of November, 1902; said limited and special appearance being in writing and filed with the papers in this cause. And, accompanying said motion to enlarge the rule, the respondents, by their counsel, in consideration of the enlargement of the said rule, give the court and opposing counsel the assurance that said board of State canvassers will not ascertain the result of the votes cast, or issue any certificates of election to the candidates for representatives in the Congress of the United States at the election held November 4th, 1902, in the State of Virginia, until after the 28th day of November, 1902; unless otherwise ordered by some court of competent jurisdiction, provided, further, that in case any legel proceedings shall be instituted in any other court to compel said board of State canvassers to canvass said votes or issue said certificates, said board will immediately notify counsel for the petitioners so as to give them opportunity to protect their rights before said board acts under any order which may be issued by another court.

Thereupon, the petitioners not objecting to the entry of the said order, said rule is accordingly enlarged.

EDMUND WADDILL, JR.,
United States Judge.

Answer of Defendants.

145 Answer.

Injunction Suit.

SELDEN and Others, Complainants, *vs.* VIRGINIA STATE BOARD OF CANVASSERS, Respondents.	Answer of Respondents to Rule to Show Cause Why a Temporary Injunction Shall Not be Awarded.

William A. Anderson, attorney-general, and
Frank W. Christian, for the respondents.

145*a* In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM SELDEN, WILLIAM H. ANDERSON, and CLARENCE B. GILPIN, Complainants, *vs.* ANDREW J. MONTAGUE, Governor of Virginia; DAVID Q. EGGLESTON, Secretary of the Commonwealth of Virginia; MORTON MARYE, Auditor of Public Accounts of Virginia; ASHER W. HARMAN, Jr., Treasurer of Virginia, and WILLIAM A. ANDERSON, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	In Equity.

The answer of the above-named respondents to a rule heretofore awarded in this case, which was made returnable on the 20th day of November, 1902, and afterwards enlarged to this day, requiring the said respondents to show cause, if any they can, why a temporary restraining —, as prayed for in the bill, should not be granted them and each of them in accordance with the prayers of said bill.

These respondents, for answer to said rule, answer and say:

(1.) They deny that this court has any jurisdiction to entertain this suit, or to enter any order therein, because the same is a suit against the State of Virginia, and is in violation of the eleventh amendment to the Constitution of the United States. The said Andrew J. Montague is governor of the Commonwealth of Virginia; the said David Q. Eggleston is secretary of the Commonwealth
146 of Virginia; the said Morton Marye is auditor of the public accounts of the Commonwealth of Virginia; the said Asher W. Harman, Jr., is treasurer of the Commonwealth of Virginia, and the said William A. Anderson is attorney-general of the Common-

wealth of Virginia. As such officers of the State of Virginia, they constitute the board of State canvassers under the provisions of section 139 of the Code of Virginia of 1887, which reads as follows:

"SECTION 139. Board of State canvassers.—The governor, secretary of the Commonwealth, auditor of public accounts, State treasurer, and attorney-general, or any three of them, shall constitute the board of State canvassers."

The duties of said board are defined and set forth in section 142 of the Code of Virginia of 1887, which reads, as follows:

SEC. 142. How election returns canvassed by State board, and certificates of election given.—For the purpose of canvassing the result of elections, the board of State canvassers shall meet at the office of the secretary of the Commonwealth on the fourth Monday in November next after the election, when they shall, upon the certified abstracts on file in the office of the secretary of the Commonwealth, proceed to examine and make statements of the whole number of votes given at such election for attorney-general, members of the senate and house of delegates, representatives in Congress, and electors of President and Vice-President of the United States, or for so many of said officers as have been voted for at such election, which statements shall show the names of persons to whom such votes have been given for either of the said offices, and the whole number given to each, distinguishing the several districts, cities and counties in which they were given; they shall certify such statements to be correct and subscribe their names thereto, and they shall thereupon determine what persons have been by the greatest number of votes duly elected to such offices, or either of them, and shall endorse and subscribe on such statements a certificate of such determination, and deliver them to the secretary of the Commonwealth. The secretary of the Commonwealth shall record in a suitable book to be kept by him in his office for the purpose, each certified statement and determination as made by the board
147 of State canvassers, and shall without delay make out and transmit to each of the persons thereby declared to be elected (except the attorney-general, who shall be commissioned by the governor), a certificate of his election, certified by him under his seal of office. In the election of a senator, he shall forward to the clerk of the senate a certificate of the election of such senator; and in the case of the election of a member of the house of delegates, he shall forward to the clerk of the house of delegates a certificate of the election of such member. And upon the first day of the session of the General Assembly, he shall lay before each house a list of the members elected thereto, with the districts they represent. In case of special elections to fill vacancies held at any other time than that fixed for general elections, the board of State canvassers shall meet at the office of the secretary of the Commonwealth on the day after the returns of such elections are received, for the purpose of canvassing the result of such special elections in the manner hereinbefore set forth; and if all the abstracts of votes to be counted shall not have been received within the twelve days, the said board shall adjourn

from day to day until they shall be so received by the secretary of the Commonwealth."

The acts and things required to be done by the said statute can be performed by these respondents only in their official character as members of the board of State canvassers, and none of the said things can be done by any member of the said board individually. The said sections 139 and 142 were enacted in the year 1870 in substantially the same form in which they now stand upon the statute books of Virginia. (See Acts of 1869–'70, chap. 76, sections 45, 48 to 50.) Respondents were elected to their offices under the constitution and laws of the State of Virginia, existing prior to the adoption of the present constitution and registration ordinance, referred to in the bill; and the validity of said sections 139 and 142 of the Code of Virginia is not denied or questioned by the complainants; and the title of respondents to their officers as *de jure* and *de facto* officers cannot be denied.

In order that a suit may be a suit against a State, it is not
148 necessary that the State shall be a party to the record. The suit is equally forbidden if it is against officers of a State in any case where the suit directly affects the State's property, rights, liabilities, or political and governmental action.

In determining whether a particular suit against a State officer constitutes a suit against the State, regard must be had to the nature of the right asserted and the relief sought in each particular proceeding.

When the precise right claimed and the precise relief sought in the present suit is clearly understood, it becomes plain that the suit is one against the State itself. Let us enquire briefly what is the precise right asserted and the precise relief prayed in this proceeding.

The allegations of the bill are greatly lacking in clearness and precision; but, giving those allegations the most favorable interpretation to the pleader, the case stated by the bill is as follows: That all three of the complainants suffered wrong at the hands of the registrars, in either refusing or failing to put their names upon the registration list; and that one of the complainants suffered wrong at the hands of the judges of election in their refusal to receive his vote.

The averment as to two of the complainants is, that they were duly qualified voters of the State; that they applied to register; that the registrars refused to place their names upon the registration list. As to one of them, it is alleged that he took no appeal from this refusal of the registrars, "because he did not believe he was bound to appeal, or that he would get justice if he did." And as to the other complainant, the averment is that he "appealed to the judge of the corporation court, and was informed his appeal was filed too late."

In passing, these respondents deem it proper to stamp this reflection upon the honorable judge of the corporation court of the city of Richmond as absolutely gratuitous and unfounded.

In respect to the excuse given by the other complainant, for failing to appeal, it is needless to say it presents no justification at all

for the omission to do what he might do, and ought to have
149 done, to protect his rights by the means afforded him by the registration ordinance.

Neither of these two complainants allege that they offered to vote at all. Their only grievance, therefore, consists in having been rejected by the registrars, which rejection they made no effort to redress in the manner pointed out in the registration ordinance.

As to the other complainant, William H. Anderson, the averments of the bill are, that he also was a qualified voter, by reason of having served as a soldier, and that he had been honorably discharged. That when he applied for registration, the registrars pretended to register him, and pretended to copy his name on the registration list, from his discharge, which was exhibited to them; and that he offered to vote on election day, but that his vote was rejected, although the election judges knew him personally, because his name was entered on the registration list as William *A*. Anderson. That his description in other respects on the registration list was correct; that he offered to be sworn as to his identity, but the judges refused him; that he tried to find the judge of the corporation court to obtain redress, and found the judge was out of town.

So far as the failure, whether it was intentional or not, on the part of the registrars to enter the name of this complainant on the registration list is concerned, these respondents submit that it was the duty of the said Anderson to have examined the registration list in due time to ascertain whether or not his name was correctly entered thereon, and to have had the error corrected by appeal to the courts, as permitted by law, for which there was ample time and opportunity under the provisions of the registration ordinance, since the registration was required to be closed on or before October 15, 1902, and the election did not take place until November 4, 1902.

So far as the action of the judges of election in rejecting his vote is concerned, that action was apparently proper under the language of the statutes of Virginia relating to voting, which were passed long
prior to the adoption of the existing constitution of Virginia.
150 Those statutes are embodied in sections 125, 126 and 127 of the Code of Virginia of 1887—the first (section 125) being amended by an act of the General Assembly of Virginia, approved March 6, 1890 (Acts of 1889–'90, p. 191).

Those statutes read as follows:

"SEC. 125. How ballots received and names of voters entered on poll books.—The judge to whom any ballot is delivered shall upon receipt thereof pronounce with an audible voice the name of the person from whom the ballot is received, and if the name of the person is found on the registration book, and there be no objection made, the said judge shall, without opening said ballot or permitting the same to be examined (except to ascertain whether it is a single ballot), deposit the same in the ballot-box; whereupon the name of the elector shall be checked on the registration book by one of the judges, and entered by the clerks of election on the poll-

books and correctly numbered in accordance with the number of electors theretofore recorded. * * *"

"SEC. 126. Challenges.—Any elector may, and it shall be the duty of the judges of election to, challenge the vote of any person who may be known or suspected not to be a duly qualified voter."

"SEC. 127. How challenge tried.—When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him as to the same; and if the person insists that he is qualified, and the challenge is not withdrawn, one of the judges shall tender to him the following oath: 'You do solemnly swear (or affirm) that you are a citizen of the United States, that you are twenty-one years old, that you have resided in this State for twelve months, and in this county, city, or town, for the three months next preceding this election; and that you are not disqualified from voting by the constitution or laws of this State; that your name is (here insert the name given); that in such name you were duly registered as a voter of this election district; that you are now an actual resident of the same; that you are the identical person you represent yourself to be; and that you have not voted in this election, at this or any voting place. So help you God.' * * *"

(See Code of Virginia, 1887, sections 126 and 127; Acts of
151 1889–'90, p. 191, or Supplement to the Code of Virginia (1898), p. 20).

Under the letter, certainly of these provisions, of the statute law, the judges had no power to receive the vote of any person whose name was not actually on the registration list.

As to the allegation that the complainant Anderson sought redress, but found the judge of the hustings or corporation court out of the city, the statutes of Virginia then and now in force expressly provide that in the absence of the judge of the hustings or corporation court, or his inability from any cause to discharge any official duty required by law, such duty may be discharged by the judge of any of the other courts of record in the city of Richmond, of which there are three. (See Code of 1887, section 3079; and section 7 of an act establishing the law and equity court of the city of Richmond (Supplement to Code (1898), p. 330.)

Besides, jurisdiction of writs of mandamus is conferred by statute on all the courts of the said city, and the judges thereof in vacation. (See Code of 1887, sections 3080, 3069, 3058 and 3218; Supplement to Code (1898), pp. 328–9.)

So that, if Anderson was entitled to have his vote accepted, still he failed to avail himself of all the remedies afforded for the protection of that right.

But all of this is not necessary in answer to the case stated in the bill; and these respondents have gone into this detail more for the purpose of vindicating the election officers from the imputations of intentional wrongdoing, cast upon them in the bill, than from any sense that such answer was necessary upon the legal merits of the particular matter. For, whether the failure on the part of Anderson

arose from his own fault, or from the errors, or even frauds, of the election officers, it still remains that the rejection of his vote arose merely in the administration of the law, and not from any failure in the law itself to provide ample remedies to secure the rights of voters. Such miscarriages must always occur, in special cases, in the execution of a law; but they constitute no reason for holding the law itself to be void.

152 If complainants are right in the contention that the constitution and registration ordinance are void, it plainly follows that any registration of their names under said ordinance would have been equally void; and that, therefore, the failure or refusal to put their names on the registration list could not constitute a legal wrong.

If, on the other hand, the said constitution and registration ordinance are valid in law, then the complainants were plainly bound to avail themselves of the means pointed out in the ordinance for any refusal to register them, if they were qualified. And, in either purview, so far as registration is concerned, they cannot complain; and their grievance in that respect would resolve itself into a case of loss or damage, without injury.

But let it be assumed that a wrong was done the complainants by the refusal or failure of the registrars to put their names upon the registration books, and by the alleged refusal of the judges of election to allow the complainant Anderson to vote. It still remains that the wrongs so committed are past, and that this suit is not brought for the purpose of redressing those wrongs; nor can any relief granted in this suit have the effect of redressing those alleged wrongs. The present suit is not for the purpose of recovering damages for any refusal to register the complainants, or for any refusal to receive their votes at the election held on November 4, 1902. Being a suit in equity, it, of course, could not have that object or effect. The suit is not brought against the registrars who conducted the registration, nor the judges who conducted the election. It is not brought, and could not be brought at this stage, if it could be at any time, for the purpose of compelling the registrars to place their names upon the registration list, nor to compel the judges of election to receive their votes; nor for the purpose of enjoining either of those classes of officers from interfering with and hindering them in the exercise of their alleged rights of registering and voting.

The right of each qualified voter to cast his vote is at least a separate and distinct right. When he sues in damages for the deprivation of that right, or brings proceedings to specifically enforce its enjoyment, he in no way interferes with the rights and in-

153 terests of other voters. Courts of the highest authority have denied that equity has any jurisdiction to specifically enforce, by injunction mandatory or otherwise, the enjoyment even of this distinct and separate right to vote, because the right is one that is political in its character; and it follows *a fortiori* that the relief asked here will not be granted since it cannot be enforced by a court of equity without interfering with the political functions and duties

of officers of elections, and also affecting the rights of others not before the court.

In the present case, the complainants are not seeking the enforcement of these primary rights, but are asking that this court will declare the entire election held on November 4, 1902, to be void, and, upon that ground, will restrain this board from canvassing the returns of the election from the whole State of Virginia, and from ascertaining the result of the said election, and from issuing certificates of election to those persons who received a majority of the votes cast at that election for members of the House of Representatives.

The present suit, therefore, does not seek to enforce or to obtain redress for the primary right of the complainants to vote, if they were qualified to do so. The grievances set out by them can be redressed, if at all, only in an action at law. They cannot support the present bill; and the acts sought to be enjoined, if performed, would not constitute a legal injury or support an action at law.

In addition to this, the relief prayed could not be granted without affecting the rights of others not before the court; and it would necessarily and directly interfere with and obstruct political officers of the government in the discharge of purely political and governmental functions and duties.

If this be a correct statement of the precise relief prayed in this case, it is plain, under the decisions of the United States Supreme Court, we submit, that the case constitutes a suit against the State of Virginia, within the prohibition of the eleventh amendment to the Federal Constitution.

In the case of *Cunningham v. Railroad Co.*, 109 U. S., 452, Mr. Justice Miller, delivering the opinion of the Supreme Court
154 of the United States, defined the two classes of cases in which suits against officers of a State could be maintained in the Federal courts without violating the eleventh amendment.

The first class of cases stated by him are cases where the officer is sued in an action at law for some act injurious to the plaintiff, and the officer seeks to justify his action under a State statute which is unconstitutional. This class of cases refers to actions to recover damages for the wrongful act after it is performed, and must necessarily be in the form of an action at law. The present case is, of course, not of that description, being a bill in equity, seeking, not damages for past acts, but an injunction against future acts, and it may be said in passing, against a future act which, if performed, could not constitute a legal wrong.

The second class of cases defined by Mr. Justice Miller, in delivering his opinion in the said case of *Cunningham v. Railroad Co.*, 109 U. S. 452, refers to cases in which the Federal courts have been called upon, either by mandamus as an incident to a jurisdiction already vested in them, or by injunction, mandatory or otherwise, to compel or restrain the doing of some act on the part of the defendant who is an officer of a State.

In defining this class of cases, Mr. Justice Miller used the following carefully guarded language, saying that such a suit could be

maintained "where the law has imposed upon an officer of the Government a *well-defined* duty in regard to a *specific matter, not affecting the general powers or functions of the Government*, but in the performance of which one or more individuals have a *distinct interest capable of enforcement by judicial process.*" (Italics ours.)

Mr. Justice Miller adds that the Federal courts, in entertaining some cases arising under this class, have gone to the "verge of sound doctrine, if not beyond it, and that the principle should be extended no further." 109 U. S., 453.

If this case be tested by the limits defined in this carefully selected language, it is palpable that it goes far beyond the bounds fixed by the court. In the first place, the complainants have not a
155 distinct interest in the performance of the duties imposed upon the board of State canvassers; but an interest intermingled with that of every other member of the body politic in Virginia. All persons who voted at the election held on November 4, 1902, have an interest in the action of the board of State canvassers, which is sought to be restrained. All persons who failed to vote at that election are presumed in law to have assented to the action of a majority of those voting, and are, therefore, interested. The candidates for the House of Representatives, voted for, have an interest. And, in addition, the Commonwealth of Virginia and the United States, each has a profound interest—not a property interest, nor an interest of a pecuniary character, but an interest of the most fundamental and important character in their governmental and political capacities. The State of Virginia is entitled to representation in Congress under the Constitution of the United States, and, therefore, has a direct interest, which would be necessarily obstructed, interfered with and, indeed, actually destroyed by any order in this court; for no relief prayed in the bill can be granted at all except upon the ground that the election held on November 4, 1902, was itself void.

Inasmuch as any relief whatever given in this cause will necessarily affect this important interest of the Commonwealth of Virginia, she is an indispensable party to the bill. If these respondents represent her, the suit is forbidden by the eleventh amendment to the Constitution of the United States. If these respondents do not represent her, then the proceeding is absolutely barred by the fact that she is an indispensable party, and cannot be brought before the court.

The precise right, then, the enforcement of which is sought in this case, is not a distinct right of the complainants, not mingled with the rights and interests of others; and, therefore, it does not come within the language so carefully framed by Mr. Justice Miller, above quoted.

When we come, on the other hand, to consider the duties and functions of these respondents, as constituting the board of State canvassers, it will be seen that, in relation to them, this case goes far beyond the limits prescribed by Mr. Justice Miller, deliv-
156 ering the opinion of the United States Supreme Court in the case above referred to. The duties and functions in question

do not constitute "a well-defined duty in regard to a specific matter," but, on the contrary, constitute all the functions and duties that this board is required to perform under the law. Those duties, while in one sense ministerial, are also duties involving executive discretion; and, more than all, they fall outside the limitations fixed by the Supreme Court of the United States, because those duties affect deeply and fundamentally "the general powers and functions of the government."

The duties of this board are strictly political and governmental in their nature, affecting the entire body politic in its relation to the State and Federal governments. The precise relief prayed, then, in this case is necessarily against these respondents in their political and governmental capacities, and, therefore, necessarily constitutes a suit against the political action of the State itself, and would necessarily affect rights and interests of the State and the people generally, of which the State itself is the only representative under the principles of public law.

The respondents discharge their duties solely as a board; and, in the discharge of those duties, they have no private interest whatever.

If what we have said be correct, it follows that the present suit is an effort to restrain this board in the performance of duties and functions that are purely executive, political and governmental, under a statute of Virginia, passed in pursuance of a power derived from the Federal Constitution itself; duties and functions devolved upon this board solely as a public and governmental agency in the performance whereof not only the Commonwealth of Virginia but the United States itself is profoundly concerned.

For these reasons, we submit this case is a suit against the State, and prohibited.

(2.) The respondents further say if they should be in error in the contention above set forth that this case constitutes a suit against Virginia, still they claim, for the reasons already stated, that the right asserted by the complainants is a political right,
157 and that the duties and functions sought to be restrained are political, governmental and executive duties and functions; and this court is, therefore, without any jurisdiction to entertain the suit, or make any order therein.

(3.) The respondents further say that the Constitution of the United States, article I., section 4, clause 1, provides as follows:

"The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of chusing Senators."

Congress has heretofore allowed the States to make regulations on this subject. Shortly after the Federal Constitution was adopted, Virginia, in pursuance of this provision, enacted laws apportioning her representation in Congress, declaring when and how members of the House of Representatives should be chosen, providing for the returns of such elections and declaring the results thereof. (See 12

Hen. Stats. at Large 653; 13 do. 331; 1 Tuck. Bl. 191.) These methods have from time to time undergone modification in form; but it is believed regulations on the subject have continually existed under the statute law of Virginia. Statutes passed many years ago are now in force in Virginia on the subject, and the statute in relation to canvassing the returns and issuing certificates of election (being section 142 of the Code, already quoted) has been in force in substantially the same form since its enactment in 1870. This statute is a valid act of the legislature, passed pursuant to an authority prescribed by the Federal Constitution, and establishes the method, and the only method, for ascertaining and certifying the results of election of members of the House of Representatives in Virginia.

The duties to be performed by the board in relation thereto, fundamentally affect the constitution of the House of Representatives, and, thus, the Federal Government itself. If an injunction will lie against this board to prevent their canvassing said returns and declaring the results of the said election, and issuing certificates of election to the persons elected, it would be equally competent for the
158 court to restrain all of the steps in the election of representatives in the lower house of Congress, and all the officers of election, among others the judges who receive the votes and make returns to the board of election commissioners, and, next in order, the board of election commissioners who canvass the returns in the various localities, and make return thereof to the board of State canvassers. And thus it would be competent for this court to stop the whole machinery for the casting of votes, the counting of votes, the return of the votes, and the ascertainment of the results of elections for members of the House of Representatives; and thus to hinder, impede and prevent the election of members of that house under the only law in force—Congress never having exercised its power to prescribe regulations on the subject.

These respondents respectfully submit that this court has no jurisdiction to restrain or interfere with the exercise of the public duties of this board in relation to elections to the House of Representatives, which forms a part of a co-ordinate branch of the Federal Government.

(4.) Respondents further say that the Constitution of the United States, article I., section 5, clause 1, provides as follows:

"Each house shall be the judge of the elections, returns and qualifications of its own members. * * *"

Respondents submit that this provision of the Constitution, making the House of Representatives the judge of the elections and returns of its own members, makes it the sole judge thereof.

The bill in this case seeks to have this court decide that the election held on November 4, 1892, for members of the House of Representatives was null and void; and that the returns of said election are null and void; and to restrain these respondents from canvassing said returns and certifying the results of that election. The exercise of such a jurisdiction, if not arrested, would ultimately destroy the independence of a co-ordinate department of the government.

It may be said that the specific relief prayed for here is limited to an injunction against canvassing the returns and issuing certificates of election, and that it is still competent for the House of
159 Representatives to send for those returns and canvass them and declare who, if any one, has been elected at the said election. Suppose the relief prayed for be looked at in this restricted manner. Still, it remains that this court would exercise a jurisdiction to interfere with and control one of the instrumentalities and agencies provided by a statute of Virginia passed pursuant to a provision of the Federal Constitution itself, for the purpose of vesting in this board the exercise of the jurisdiction and functions which the complainants are seeking here to have this court interfere with and restrain. Not only would such an interference be contrary to fundamental principles of a republican government; but it is manifest that even a temporary interference, although the lower house of Congress might disregard or reverse any order this court might enter, might at least temporarily affect the membership and organization of the House of Representatives. It is needless to point out that, by the concurrent action of several courts, or even by the action of a single judge, if this jurisdiction were recognized, the political complexion of the House of Representatives might be changed, at least for a time; and the great difficulties in the way of remedying such an interference, which would deprive members of the house of their *prima facie* right, are manifest. Nor is it necessary that these respondents should comment upon the danger that the judicial tribunals would be dragged into the arena of partisan politics and the evil consequences that would flow therefrom.

But, in truth, the relief prayed in this bill goes even further than is thus supposed, for, while the specific relief is restricted, as above stated, the right to that relief is based, and solely based, upon the ground that the election held on November 4, 1902, was absolutely null and void; and, under the frame of the bill in the case, no order or decree whatever can be entered by the court in favor of the complainants, except upon the basis and decision that the said election was wholly void. If this court should make such a decision, whom would it bind? Surely, it will not be contended that the representatives elected would be bound. They could still apply to the House of Representatives to be seated. Surely, it will not be
160 contended that the House of Representatives itself will be bound. The only escape from the position that such a decision would trench upon the independence and prerogatives of the House of Representatives, and upon the rights and privileges of the persons elected to that house, would be in the concession that the decision and decree of this court would be futile as to those most directly interested in it. It is respectfully submitted that no court will enter a decree in the air, which cannot bind those persons who are mainly and directly interested, and which the court is wholly without the power of enforcing, in an effective way, simply to gratify complainants who (not seeking redress of their primary rights) are

attempting to have the court pass in a moot case upon constitutional questions of the most important and fundamental character.

The separation of the powers of government forms the keystone of the republican arch, and is commanded by the Constitution of the United States and of the different States, including Virginia. It is plainly inconsistant with the existence and security of the House of Representatives that any court shall have power to interfere with and enjoin officers clothed with the duty of superintending the election and returns of its members.

(5.) The Commonwealth of Virginia is also deeply interested, and its rights would necessarily be affected by any order this court should make in this case. The Commonwealth of Virginia, representing the people of Virginia, is granted representation in the lower house of Congress by the Federal Constitution. And these respondents respectfully submit that it cannot be tolerated, under our institutions where the independence of the State and Federal governments each from interference with the other in its operations within its legitimate sphere is guaranteed, that a Federal court, under the guise of protecting the rights of individual voters, should have power, by writ of injunction, to deprive the entire people of the Commonwealth of Virginia of representation in the lower house of Congress, guaranteed to them by the Constitution of the United States.

If the courts can interfere, and withhold writs of election
161 from the representatives in one State, they may do so in many at the same time, and thus deprive not only the people of a State of their representation in the lower house of Congress, but effectually destroy the existence of the House of Representatives of the United States.

And if the courts may interfere for the purpose of preventing the issuance of certificates of election, they can likewise interfere to prevent the holding of the elections themselves.

Such a jurisdiction, if recognized, would in time imperil the existence of government and the continuance of free institutions.

(6.) Respondents further submit that under the rules of equity, no order can be made in the absence of indispensable parties; and that in this case the rights and interests of others than the complainants would be necessarily directly affected by any relief granted in this cause; and, therefore, the court cannot proceed. And, especially, it is insisted that if it be considered that the suit is not a suit against Virginia, by reason of its being brought against these respondents as officers of the State, nevertheless the State has such interests and rights in the relief prayed for, and will necessarily be so affected thereby, that the said relief cannot be granted in the absence of Virginia as a party to the record; and, as she cannot be brought before the court, the court has no jurisdiction of this suit.

(7.) Respondents further submit that, in order that the complainants may maintain this suit, they must show not only that it is embraced within the Federal Constitution, but also within the jurisdiction of this court as conferred by an act of Congress granting the

particular jurisdiction. And these respondents submit that there is no act of Congress conferring jurisdiction upon this court in such a case as this; and, therefore, this court, upon this ground also, is without jurisdiction to entertain this suit or grant any relief therein.

(8.) The primary right of the plaintiffs, if they were duly qualified voters, was the right to vote. We have seen that the bill is not based directly upon the existence or denial of this specific right. The averments in the bill, touching the alleged existence and denial of the right to register and vote, form merely the induce-
162 ment, and not the gravamen, of the suit. The relief prayed in the bill is based (if it has any ground at all to stand upon) upon some supposed right of the plaintiffs to prevent commissions issuing to representatives in the lower house of Congress from all the districts in Virginia, because they were improperly denied a voice in the election of the representative from the third district. The only interest the plaintiffs had in the declaration of the result of the election, even of the representative from the third district, is in consequence of their alleged right of suffrage, and is one which they enjoy in common with all the other voters of that district. This is an interest such as all citizens have in public matters, but it does not constitute a right, within the true sense of that word in the law. In other words, it is in no wise a substantive or enforcible right by any proceeding in court. The only substantive and enforcible right is the right to vote, including, of course, the steps enabling that right to be exercised; and that right may be redressed by appropriate proceedings in the court, founded directly upon the violation of the specific right, and against proper parties of whom the court has jurisdiction. But when the election has been concluded, and the returns come to be counted and canvassed, and the results of the election to be declared, then it is obvious that no single voter or class of voters has a right to restrain the issuance of a certificate of election to the candidate receiving a majority of the votes cast, although the plaintiffs may have been denied the right of voting under the provisions of an unconstitutional statute. Otherwise, it is apparent that a few voters, or even a single voter, might nullify the results of an election, because his right to vote at the election had been improperly refused. In such cases, the only remedy lies in a contest of the election before the House of Representatives, which has full jurisdiction to decide the matter, and can, if it sees fit, unseat the person claimed to be elected, and seat the rival candidate, or nullify the election and order a new one, as the House shall think proper upon the case made.

This court cannot exercise a general jurisdiction, even in cases where civil and property rights are concerned, much less can
163 it where merely political rights are in question, to enjoin the execution of a State statute because it is claimed to be, or is actually, unconstitutional, unless such relief is asked upon a case stated by the plaintiffs, directly based upon a sufficient ground of action, appropriate for judicial cognizance and relief, against proper parties subject to the jurisdiction of the court.

The case stated for relief under this bill is not of that character, but merely makes out an abstract or moot case: and the plaintiffs bring this bill evidently for the purpose, not of redressing the alleged grievances suffered by them, but in order to get the opinion of the court upon the abstract question whether the constitution of Virginia is a valid constitution, and whether the suffrage article of that constitution is a valid suffrage article.

(9.) Further, the said bill cannot be maintained, for the reason that the complainants will not suffer irreparable damage nor any damage at all, if this court shall decline to grant the relief prayed for in this bill.

(10.) Further, if as complainants contend, the said constitution and ordinance are void on their face, or if as complainants allege, they are full handed with proof to show such invalidity, then, upon the principles settled in equity, this court would have no jurisdiction to declare the election held on November 4, 1902, void, or to enjoin the issuance of certificates of election to the persons receiving the largest number of votes at that election, for the reason that the action of this board could not give any additional effect or validity to the said election and to the said writs if they are void, as the plaintiffs claim; and the action of this court in the premises would, upon the case stated, be unnecessary. The only effect of any decree entered here would be to affect temporarily the right of the successful candidates to occupy their seats in the House of Representatives, and this would infringe upon the rights of that House.

(11.) While these respondents do not feel that it is either necessary or proper that they should at this stage notice or answer all the details of the complainants' bill, it is deemed proper that they
164 should notice and take issue upon some of the positions and statements made in said bill, which they will now proceed to do:

(*a.*) In the first place, they think it is not improper that they should express the surprise they feel to find that at this late day, nearly forty years after the end of the late unhappy war, serious reliance should apparently be placed upon the restrictions upon the State of Virginia in respect to suffrage attempted to be imposed by the act of Congress of January the 26th, 1870.

The right of suffrage is one derived from the State itself. The only limitation upon the power of the State springs from the provision of the Constitution of the United States that such right shall not be abridged or denied on account of race, color or previous condition of servitude. The only right in respect to suffrage derived from the Federal Constitution is the right to be exempt from discrimination on account of race, color or previous condition of servitude; and the right of voters in the State who have the qualifications prescribed by the State for voters of the most numerous branch of the State legislature to vote for members of Congress.

The right of a State to determine for itself from time to time according to then existing exigencies what persons or classes of persons possess sufficient intelligence, virtue and interest in the Com-

monwealth to entitle them to exercise the right of voting is one of the most fundamental and important rights which can belong to a free people. The existence of such right to regulate suffrage is as important to those who may be unfit for its exercise as it is to the welfare and happiness of those entrusted with it, and it may be safely affirmed that this right to regulate suffrage within its borders is possessed by the State of Virginia to the same extent and in the same degree as it is by the States of Massachusetts or New York. It is denied that the restrictions attempted to be imposed by the act of Congress of January the 26th, 1870, were ever expressly accepted by the State of Virginia. Even the legislature of the State would have no power to impose such a fundamental limitation upon the power of the State.

The act of Congress of January the 26th, 1870, was part and parcel of the reconstruction legislation adopted by Congress after the
165 war, which legislation has never been passed upon directly, we believe, by the Supreme Court of the United States; but it can hardly be said that there is any doubt in the professional mind of this country as to what fate that legislation would have received if it had ever been allowed to be subjected to the decision of the Supreme Court of the United States.

That tribunal has held repeatedly that, while the effect of the late war was to establish hostile governments in the States who undertook to secede and to sever temporarily the relations of the *governments* of those States to the Union, the *States* themselves were never beyond its pale, and that after the question of the right of those States to secede had been settled by the arbitrament of arms, they remained in the Union, subject to the duties and limited surrender of power contained in the Federal Constitution and also entitled to all the rights granted by it or reserved to themselves or their people.

The power to pass the reconstruction measures was based solely upon the requirement of the Constitution that "the United States shall guarantee to every State in this Union a republican form of government."

Under this provision, Congress had the right to adopt only such measures as were necessary and appropriate to secure that result. The power was a power of guaranteeing or insuring, not a power of originating or establishing provisions of government in the several States.

We have seen that a government may be republican in form without a universal or unlimited suffrage. Indeed, it is inconsistent with any wise or well-ordered government that there should be a basis of suffrage which is unalterable in view of the changing circumstances and conditions of the body politic. It must, therefore, be palpable that the restriction embodied in the act of Congress of January the 26th, 1870, was not a necessary and appropriate means of guaranteeing to the State of Virginia a republican form of government and that, therefore, Congress had no power in this extra-

constitutional method to inject any such restriction into the fundamental law of this State.

When the people of Virginia had adopted the constitution
166 of 1869 and elected executive and legislative officers and members of the House of Representatives they had organized a republican form of government as required by the Federal Constitution, and the obligations of Virginia (the principal obligor) to the Constitution of the United States having been performed, there remained nothing for the guarantor to do.

The right of representation in Congress belonged to the State of Virginia under the Constitution of the United States as much as it did to the other States in the Union, and it was entitled to the enjoyment of that right without condition and without restriction. Accordingly, it must follow that this restriction upon the fundamental rights of the State as a condition to the enjoyment of its constitutional right to representation in Congress was not binding upon the State either in law or in morals.

(*b.*) The schedule and the ordinance of registration referred to in the bill formed a part of, and were incidental to, the constitution of 1902. The ordinance is referred to repeatedly in the constitution itself as a part of its provisions, and some of the articles of the constitution were made dependent for their effect and execution upon the said ordinance.

The respondents submit that the whole of the said constitution, schedule and ordinance were validly adopted by the constitutional convention and that the same became operative and effective for all purposes as a constitution of this Commonwealth on the 10th day of July, 1902, in accordance with the mandate of the said convention.

The power of the convention to ordain the constitution without submission for ratification to the vote of the people is beyond serious question. Mr. J. R. Tucker, in his work on the Constitution, says:

"During the last half century or more it has been the usual practice for the convention to frame the constitution and then submit it to a popular vote for final ratification. But this practice has had exceptions, and it may be safely stated that the validity of a constitution will not be held to depend upon its final ratification by popular vote."

1st Tucker on the Constitution, page 69.

167 This learned constitutional author points out that the first constitutions of all of the original States, including Virginia, were ordained by conventions without ratification by the people; that the first constitution of Virginia, drawn by George Mason and so ordained, was held to be valid by our court in *Kamper v. Hawkins*, 1st Va. Cases, 20, and that the Constitution of the United States was adopted by a convention and ratified by conventions in the several States without submission to popular vote and that the various amendments of the Federal Constitution have been adopted without

ratification by the people; that the same practice has been adopted recently in several of the Southern States, and that in the case of Mississippi the validity of its constitution so adopted was affirmed in the case of *Williams v. Mississippi*, 170 United States, 213, remarking, however, that it seemed that the question under discussion was not raised in that case.

It may be added that the Virginia constitutional conventions of 1830 and of 1850 in effect ordained their suffrage articles, submitting the residue of the constitution to the enlarged class of voters enfranchised by them.

It is respectfully submitted that a convention representing, as it does, the body politic, itself has inherent and absolute power to ordain a constitution without submitting it back to the people themselves. This is still clearer in Virginia, when the provisions of article 12 of the constitution of 1869, which provide for changes in the constitution, are examined. The first section of article 12 provides for changes to be effected through the medium of two legislatures of the State, chosen at successive elections, it being provided that amendments may be proposed and if agreed to by a majority of the members of both houses, the same shall be referred to the General Assembly chosen at the next general election; and if that General Assembly shall agree to the proposed amendment it shall be its duty to submit the amendment to the people; and if the people approve and ratify the amendment, it shall become a part of the constitution.

Section 2 of article 12 is in strong contrast with the pro-
168 visions just referred to. Section 2 provides for the adoption of a new, revised or amended constitution, through the action of a constitutional convention, and instead of providing that its action shall be submitted to ratification by popular vote, it entirely omits any such requirement, and by the plain meaning of the language used confers final and absolute power upon the convention itself to ordain the constitution adopted by it. It is provided that at the general election to be held in the year 1888 and in each twentieth year thereafter and also at such time as the General Assembly may by law provide, the question, "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to the qualified electors.

In pursuance of this provision, the legislature of Virginia, by an act passed on March 5, 1900, submitted the said question in those prescribed terms to the people. The election held under the said act resulted in favor of the convention. This definitely fixed the status and powers of the convention beyond the reach of further legislative interference or restriction. The constitution provided, "in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly at its next session shall provide by law for the election of delegates to such convention."

By an act passed on February the 16th, 1901, the legislature did, in obedience to this constitutional requirement, provide for the elec-

tion of members of the convention. To that extent, and to that extent only, was the act of February the 16th, 1901, constitutional and binding. The addition thereto requiring the constitution adopted by the convention to be submitted to ratification by the vote of the people was beyond the legislative power.

In addition to this, it is believed that no constitution adopted by a convention and recognized by all the departments of government has ever been held by any court to be invalid. What constitutes the constitution of a State and when the same has become operative and effective and binding upon the people are political questions; and it has been held by courts of the highest authority that
169 when a constitution has been so recognized and accepted by all departments of government in the State, as has been done in the case of the present constitution of Virginia, the question of its validity is closed and cannot be any longer open to question. In addition to the acts of recognition referred to in the bill, the said constitution has been recognized by acts passed by the General Assembly of Virginia and approved by the governor since the said constitution went into effect.

So that, even if there could be any serious doubt about the original power to ordain the constitution of 1902, and if this question is one which can ever be passed upon by the courts of another jurisdiction than that of the State itself whose constitution is the subject of inquiry, in the present case the bill alleges the fact that the constitution of 1902 and its schedule and ordinance have been recognized by every department of government, and we, therefore, submit that its constitutionality and validity cannot now be questioned or denied.

(*c.*) Respondents submit and maintain that it was neither necessary nor proper that members of the convention should take any oath as officers of the State under the former constitution of the State and that it is a matter of no moment, so far as the validity and effect of the said constitution is concerned, whether such oaths were taken or not.

(*d.*) These respondents deny that the right of citizens of the United States to vote is denied or abridged on account of race, color or previous condition of servitude by the provisions of the said constitution, schedule or ordinance of registration, or any of them. It is submitted that there is not a single provision in the said constitution, schedule or ordinance which makes the slightest distinction between citizens of the United States on account of race, color or previous condition of servitude. It is also denied by these respondents that any denial or abridgement of the rights of citizens of the United States to vote has been made on account of race, color or previous condition of servitude by the State of Virginia or by the officers of the State of Virginia in the enforcement, application and execution of the provisions of the said constitution, schedule
170 and ordinance, or any of them. These respondents are informed and believe that the provisions of the ordinance of registration have been generally, if not in all cases, fairly and im-

partially administered without such alleged discrimination by the registrars selected and appointed by the constitutional convention as being men of character and standing in their various localities. In the discharge of their duties, the registrars were subject to severe penalties of fine and imprisonment under the statute of Virginia if they wilfully or maliciously rejected from registration or corruptly registered any person contrary to law. (See section 3854 of the Code of Virginia of 1887.) And if the registrars either purposely or by mistake improperly refused registration to any person, means of redress were afforded by appeal to the circuit and corporation courts in the different counties and cities of the State, with a right of further appeal to the supreme court of appeals, the highest court in the State, without liability for costs.

(*e.*) These respondents deny as scandalous and false the unfounded statements contained in the bill, to the effect that the governor of Virginia and the other executive officers of the State, the judges of the courts of record of the State and the members of the General Assembly of the State have united in an attempt to abandon the government of Virginia under which they were elected to office, in violation of their duties to the people or have attempted to establish and proclaim said constitution and impose the same on the people of Virginia contrary to their will, without giving the people of Virginia an opportunity to be heard, well knowing they would never ratify the same; and also the charge that the said officers, executive, judicial and legislative, have been at any time in conspiracy with the "dominant faction in said convention" for the purpose of accomplishing those results, as alleged in the bill, or for any other purpose whatsoever; or have entered into any combination or conspiracy with said "dominant faction" or any other persons or set of persons for any purpose whatsoever, as complained of in the bill. It is true that the said officers of the State, executive, judicial and legislative, have recognized the said constitution as a valid and binding
171 instrument, but they have not done so in pursuance of any combination or conspiracy of any kind, but, as your respondents believe and aver, because they were of opinion that it was their plain duty to recognize and support its provisions.

These respondents do not deem it necessary to reply in any further detail to many other matters contained in said bill, because it is not deemed proper or material to do so at this time. The said constitution has not only been thus expressly recognized by every department of the government of the State, but has been acquiesced in and accepted by the great body of the people of Virginia. It is proper to consider the disastrous consequences of now unsettling what has thus become an accomplished political fact of the highest importance in the State and to point out that the result of a decree to that effect emanating from this honorable court would necessarily produce a condition of unrest, uncertainty and chaos destructive of the peace, good order and welfare of the State.

In view of these results, as well as the other injurious consequences in the various other aspects heretofore pointed out in this answer

which would flow from such a decree, it is respectfully submitted that this court will weigh with the most anxious care the grounds of its jurisdiction and the right of the complainants to the relief sought in their bill before it will undertake to enter any decree in this cause.

And having fully answered, these respondents ask to be excused from further attendance upon this court.

ANDREW J. MONTAGUE,
Governor of Virginia.
D. Q. EGGLESTON,
Secretary of the Commonwealth of Virginia.
MORTON MARYE,
Auditor of Public Accounts of Virginia.
ASHER W. HARMAN, JR.,
Treasurer of Virginia.
WILLIAM A. ANDERSON,
Attorney-General of Virginia.

WILLIAM A. ANDERSON,
Attorney-General of Virginia,
FRANK W. CHRISTIAN,
Counsel for Respondents.

172 STATE OF VIRGINIA, *City of Richmond,* } *To wit:*

I, John S. Eggleston, a notary public in and for the city and State aforesaid, do hereby certify that Andrew J. Montague, D. Q. Eggleston, Morton Marye, Asher W. Harman, Jr., and William A. Anderson whose names are signed to the foregoing answer, this day personally appeared before me, in my said city, and made oath that the statements of fact contained in said answer, so far as made upon their own knowledge or information are true and that so far as said statements are made upon information derived from others, they believe them to be true.

Given under my hand this 27th day of November, 1902.

JOHN S. EGGLESTON,
Notary Public.

(My commission expires March 15, 1905.)

173 And thereupon afterwards, to-wit: on the 28th day of November, 1902, the said cause came on to be heard before the Honorable Melville W. Fuller, Chief Justice of the United States, allotted to the fourth circuit and Honorable Edmund Waddill, Jr., United States district judge for the eastern district of Virginia, and was argued by John S. Wise, Esquire, for the complainants, and by Frank W. Christian, for the defendants.

174 And on the following day, to-wit; the 29th day of November, 1902, the said cause came on again to be heard before the Honorable Melville W. Fuller, Chief Justice of the United States,

allotted to the fourth circuit and the Honorable Edmund Waddill, Jr., United States district judge for the eastern district of Virginia and was argued by the Honorable William A. Anderson, the attorney-general for the State of Virginia, for the defendants and John S. Wise, Esquire, and James H. Hayes, Esquire, for the defendants and submitted.

Memorandum of Chief Justice.

Filed November 29th, 1902.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, Clarence B. Gilpin *vs.* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers.	No. 538. In Equity.

Application for an injunction restraining defendants from passing on the returns of an election held November 4, 1902, in the State of Virginia, for representatives in Congress, and the secretary of Virginia from making out and transmit-ing certificates of election &c.

The rule heretofore granted herein will be discharged, and the application denied, because of want of jurisdiction.

The application is, in effect, against the Commonwealth, and the subject matter is political.

That a court of equity has no jurisdiction as such in cases within which this case falls, settled in this circuit in Green *vs.* Mills, 69 Fed., 852.

175 *Memorandum of Honorable Edmund Waddill, Jr., United States District Judge.*

Filed November 29th, 1902.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, and Clarence B. Gilpin
vs.
ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia.
No. 538. In Equity.

Believing, under the decisions of the courts of the United States, by which this court is, and should be governed, that neither of the actions now before the court can be maintained, I, for that reason, concur in the result arrived at by the Chief Justice, dismissing the same, and may hereafter file a brief memorandum in writing, embodying my views.

It is, in frankness, due however, that I should say that while I believe that this is the law, as settled by decisions, it does not entirely embody my personal views as to what that law ought to be. I can but believe that as to rights, arising under, and guaranteed to the citizen by the Constitution and laws of the United States, injuriously affecting one hundred thousand people, whether respecting their property, or their personal or political rights, and particularly the two latter classes, that they ought to be given a day in court; afforded an opportunity for a full and speedy hearing; and to that end, that technicalities, forms and ceremonies should, in large measure, be dispensed with, speedy justice afforded, and the rights of the respective parties litigant ascertained.

176 And on the 29th day of November, 1902, the following order was entered and filed, to-wit:

Order Discharging Rule and Dismissing Bill.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, and Clarence B. Gilpin *vs.* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and Wm. A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia.	In Equity. No. 538.

This day came this cause, to be again heard, upon the papers formerly read, and upon the answer of the defendants, filed November the 28th, 1902, to the rule awarded in this cause November the 15th, 1902, to which the plaintiff replied generally, and was argued by counsel,—

Whereupon, the court, for reasons stated in writing, hereby made a part of this order, doth adjudge, order and decree that the rule hereinbefore granted, citing the defendants to appear and show cause why an injunction should not be granted, as prayed in said bill, be and the same is hereby discharged, and the court doth further adjudge, order and decree that the plaintiff's bill be and the same is hereby dismissed, with costs.

MELVILLE W. FULLER,
Chief Justice of the United States, Allotted to Fourth Circuit.

177 *Petition of Complainants for Appeal.*

Filed January 3rd, 1903.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, and Clarence B. Gilpin, Complainants,
versus
ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.
} In Equity. No. 538.

To the honorable judges of the circuit court of the United States for the eastern district of Virginia:

The petition of William S. Selden, William H. Anderson and Clarence B. Gilpin respectfully represents to your honors that they are aggrieved by a decision of this honorable court rendered in the above entitled cause on the 28th day of November, 1902, whereby the court refused to entertain jurisdiction of their bill and entered a final decree dismissing the same and awarding costs against complainants.

A copy of the record in the case is hereto attached.

This petition humbly prays for an appeal from said final decision to the Supreme Court of the United States.

Accompanying this petition are the assignments of error required by the rules of said court, and the bond likewise required by said rules.

All which is respectfully submitted.

COMPLAINANTS,
By JNO. S. WISE,
Their Solicitors.

178 *Assignment of Errors.*

Filed January 3rd, 1903.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, and Clarence B. Gilpin, Complainants, *versus* ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.	In Equity. No. 538.

Assignments of error.

On behalf of the complainants the following assignments of error are filed with their petition for appeal, as required by rule 35.

First Assignment of Error.

The court erred in holding that the State was a necessary party to this proceeding.

The substance of the prayer was not to compel the State to do anything, but to prevent officers of the State from violating a plain duty.

Jurisdiction in such cases has been sustained in the Federal court in many causes.

Board *v.* McComb, 92 U. S., 531.
Davis *v.* Gray, 16 Wallace, 203.
Ralston *v.* Missouri Fund Comm'rs, 120 U. S., 391.
Blanton, Comm'r *v.* Southern Fertilizer Co., 77 Va., 335.
Kellogg *v.* Warmouth, *et al.*, 14 Fed. Cases, No. 7667.

179 *Second Assignment of Error.*

The court erred in refusing to entertain the suit, for lack of jurisdiction, because—

The rights asserted are protected by section 1979 of the Revised Statutes. The bill complained of an attempt by the defendants to subject complainants and others of their class to the deprivation of rights, privileges and immunities secured by the Constitution

and laws, under color of alleged statutes, ordinances and constitutions of Virginia, which complainants aver were not lawully passed, and not constitutional if passed.

The jurisdiction of the circuit court, to entertain such cases, is expressly conferred upon it by section 629 of the Revised Statutes, paragraph 12th, which confers jurisdiction of suits to enforce the right of citizens of the United States to vote in the several States, and by paragraph 16th, which confers upon it jurisdiction of all suits brought to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State, of rights, privileges and immunities secured to the complainants by the Constitution of the United States, or by the laws providing for equal rights of citizens of the United States.

This particular form of suit is allowed to complainants, both by the language of section 1979 of the Revised Statutes, which authorizes them to bring *a suit in equity* for redress, and by section 722 of the Revised Statutes, whereby it is expressly provided that the jurisdiction in civil matters conferred on the circuit court by the provisions of the title "civil rights" shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into
180 effect; *but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law as modified and changed by the constitution and statutes of the State, wherein the court having jurisdiction of such civil rights is held so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause.*

The aforegoing provisions were not modified by the amended jurisdiction act of August 13th, 1888 (Supp. to R. S. vol. 1, 611). On the contrary, they were expressly preserved intact. These provisions not only declaring and defining the jurisdiction, but enlarging and modifying and adapting it, so that it would not be deficient on account of precedents, were utterly ignored by the court below; and therein it erred.

Third Assignment of Error.

The court erred in refusing to entertain jurisdiction of a suit in equity to restrain the parties.

The rights of the complainants, which were interfered with, arose under a Federal statute. The wrong was under the color of a State statute. The Federal court, by the law, was empowered, in administering the remedy, to proceed, if need be, in the same manner the State courts would have proceeded.

Precedents in the State courts are abundant to show that they have, and have exercised, jurisdiction in such cases.

Blanton, Comm'r *v.* Southern Fertilizer Co. 77 Va., 335.
Pearson *v.* Supervisors, 91 Va., 322.
Spelling on Injunc. and Other Remedies, vol. 2, sec. 1744.
Kellogg *v.* Warmouth and others, 14 Fed. Cases, No. 7667.

181 If the bill had stated that the board of State commissioners were throwing dice to determine to whom they should issue the certificate, there is no doubt that a State court would have restrained them. The State would not have been a necessary party. It would have been simply to prevent officers from violating a plain duty. If the State courts could, the Federal courts can.

Fourth Assignment of Error.

The court ought to have entertained jurisdiction of the cause, and ought to have proceeded to hold that the alleged constitution, ordinances and schedule, under which defendants were acting, were null, void and of no effect; that the returns which defendants were attempting to act upon were nullities; and that defendants should be enjoined from computing or tabulating or certifying the results of said returns, or issuing any certificates thereon to any persons as members of Congress—because—

The answer filed by defendants did not traverse the allegations of fact contained in the bill, and defended only on questions of law, and the court considered and disposed of the case as on a demurrer to the bill.

Fifth Assignment of Error.

The court erred in making a final decree in the cause and dismissing it with costs? for the prayer of the bill was not only for an injunction, but for general relief.

It complained not only of the particular act threatened to be done by defendants on November 26th, 1902, but of a conspiracy onerous and continuing, to which defendants were parties, and under which and under color or certain spurious constitutions, ordinances and schedules, complainants and those of their class were and would be subjected by defendants to the deprivation of their political
182 rights, not only in the election involved, but by the same methods in other Federal elections, provided for by law, thereafter, unless the court should declare the spurious constitution, ordinance and schedule void, and prohibit the defendants from acting then or thereafter in their character as a board of State canvassers, under color of said spurious constitution, ordinance and schedule to the deprivation of the rights, immunities and privileges of complainants and their class. By adjudications of the State and Federal courts, the suit was properly brought on behalf of complainants and all others in their class, and the case should have been retained and the rights of the complainants to the general relief prayed for should have been considered and passed upon, even if the special injunction prayed for immediately was denied.

There was no adequate remedy at law to redress the grievances set forth in the bill, and the suit in equity was necessary on behalf of the class, to avoid multiplicity of suits. Especially was this equi-

table interference justifiable in view of the extraordinary jurisdiction conferred by section 722 of the Revised Statutes, with the plain intent and purpose to reach and to redress, throughout the circuit court, without regard to form or precedent, flagrant violations of the laws referred to in that section.

Sixth Assignment of Error.

The court erred in dismissing said bill.

1. Because complainants derived their rights as voters in said congressional election from the Constitution of the United States and laws enacted pursuant thereto, as well as from laws of Virginia.

2. Because the civil rights statutes created a jurisdiction in
183 the circuit court to hear said suits and authorized complainants to invoke the remedy which was denied them by said erroneous judgment.

3. Because the State courts of Virginia possessed jurisdiction to grant the relief prayed for in the form in which it was asked in this suit.

4. Because by express enactment of Federal statutes the circuit court was invested with full power to administer the remedy in the same manner as a court of the State of Virginia might have done.

5. Because in a Federal court the judiciary not only possessed the power to employ the remedies available in the State court, but not being part of the State organizations, its power to apply the remedy was unrestrained by any consideration of invading the province of a co-ordinate department of its own government, such as might influence the State judiciary.

The foregoing specific assignments of error cover, as it is believed, the requirements of the rule under which they were filed, but the plaintiff appellants, by counsel, in view of the importance of this cause and the wide range of subjects necessarily involved in its discussion, will pray the honorable, the Supreme Court of the United States for leave to discuss at the hearing all the subjects involved in said appeal, and not to confine them to the specific points designated above.

All which is respectfully submitted.

COMPLAINANTS,
By JNO. S. WISE,
JAS. H. HAYES,
Their Solicitors.

Richmond, Virginia, December 16th, 1902.

184 And on the 3rd day of January, 1903, the following order was entered allowing appeal, to-wit:

Order Allowing Appeal.

In the Circuit Court of the United States for the Eastern District of Virginia.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, and Clarence B. Gilpin, Complainants,
versus
ANDREW J. MONTAGUE, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., Treasurer of Virginia, and William A. Anderson, Attorney-General of Virginia, Constituting the Board of State Canvassers of Virginia, Respondents.
} In Equity. No. 538.

It is ordered this third day of January, 1903, upon the petition of the complainants, and assignments of error thereto annexed, that an appeal to the Supreme Court of the United States from the final decree made in the above cause on the 28th day of November, 1902, be, and the same is hereby, allowed, and a certified transcript of the record and all proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

It is further ordered that a bond of five hundred dollars be filed for damages and costs on appeal.

EDMUND W. WADDILL, JR., *Judge.*

185 *Appeal Bond.*

Filed January 3rd, 1903.

Know all men by these presents, that we, William H. Anderson of Richmond, Virginia, as principal, and J. B. Johnson of Manchester, Virginia and E. T. Jenkins of Richmond, Virginia, as surety, are held and firmly bound unto Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, in the full and just sum of five hundred dollars, to be paid to the said Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts; Asher W. Harman, Jr., treasurer of Virginia, and William

A. Anderson, attorney-general of Virginia, certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this third day of January, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a session of the circuit court of the United States in and for the eastern district of Virginia, in a suit pending in said court, between William S. Selden, William H. Anderson and Clarence B. Gilpin, complainants and Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, constituting the board of
186 State canvassers of Virginia, defendants, a decree was rendered against the said William S. Selden, William H. Anderson and Clarence B. Gilpin, and the said William S. Selden, William H. Anderson and Clarence B. Gilpin having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia, Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within twenty days from the date thereof.

Now, the condition of the above obligation is such, that if the said William S. Selden, William H. Anderson and Clarence B. Gilpin shall prosecute their appeals to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. ANDERSON. [SEAL.]
J. B. JOHNSON. [SEAL.]
E. T. JENKINS. [SEAL.]

Sealed and delivered in presence of—

JOSEPH P. BRADY,
Deputy Clerk U. S. Circuit Court.

Approved by—

EDMUND WADDILL, JR.,
United States District Judge.

187 UNITED STATES OF AMERICA, ss:

The President of the United States to Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia; Asher W. Harman, Jr., treasurer of Virginia, and William A. Anderson, attorney-general of Virginia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington within twenty days from the date hereof, pursuant to an appeal from a decree of the circuit court of the United States in and for the eastern district of Virginia in your favor passed in a cause in said court wherein William S. Selden, William H. Anderson and Clarence B. Gilpin are the complainants and you are the defendants to show cause, if any there be, why the decree rendered against the said complainants in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edmund Waddill, Jr., judge of the district court of the United States this third day of January, in the year of our Lord one thousand nine hundred and three.

EDMUND WADDILL, JR.,
U. S. Dist. Judge.

188 On this eight day of January, in the year of our Lord one thousand nine hundred — three, personally appeared Samuel Bendit, deputy United States marshal before me, the subscriber, and makes oath that he delivered a true copy of the within citation to A. J. Montague, Morton Marye, Asher W. Harmon, Jr., William A. Anderson, on January 6th, 1903, and to David Q. Eggleston, on January 8th, 1903, in the city of Richmond, Va.

SAMUEL BENDIT,
Deputy U. S. Marshal.

Sworn to and subscribed the eight day of January, A. D. 1903.

JOSEPH P. BRADY,
Dep'y Clerk U. S. Circuit Court.

Marshal's Costs.

Fees	$10.00
Expenses	.35
	$10.35

189 *Order to Transmit Record.*

In pursuance of an order of court entered in said cause a transcript of the record and proceedings, together with all things thereunto relating is hereby accordingly transmitted to the Supreme Court of the United States.

Teste: M. F. PLEASANTS, *Clerk*,
By JOSEPH P. BRADY, *Deputy Clerk*.

Clerk's Certificate.

UNITED STATES OF AMERICA, *Eastern District of Virginia*, } ss:

I, M. F. Pleasants, clerk of the United States circuit court for the eastern district of Virginia, do certify that the foregoing is a true transcript of the record and proceedings of the said court, together with all things thereunto relating, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the said court, at Richmond, Virginia, this 8th day of January, A. D. 1903.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk*,
By JOSEPH P. BRADY,
Deputy Clerk.

190 In the United States Supreme Court, October Term, 1903.

SELDEN and Others *against* THE BOARD OF STATE CANVASSERS. } No. 190. In Equity on Appeal from Cir. Ct. U. S., E. Dist. of Va.

JONES and Others *against* THE BOARD OF STATE CANVASSERS. } No. 189. In Prohibition on Writ of Error from Cir. Ct. U. S., E. Dist. of Va.

Stipulation.

The undersigned stipulate as follows concerning the above entitled causes now pending in the Supreme Court of the United States and numbered 189 and 190, October term, 1903.

That the exhibits referred to in the bill in the one case and the petition for prohibition in the other case are identical, and that said exhibits need only be printed with the record in case 189, and need not be reproduced in the record of case 190; but it shall be sufficient, if the clerk of the Supreme Court, in printing said record,

shall, in lieu of embodying said exhibits in full, make a memorandum that said exhibits are not reproduced in the record in case 190, because of this stipulation, whereby it is agreed that the exhibits, to wit: the constitution, schedule and ordinance printed with case 189 may be referred to on the argument of case 190, as if the same were therein again set forth at length.

Witness our signatures this 5th day of August, 1903.

JNO. S. WISE,
For Appellants & Plaintiffs in Error.
WILLIAM A. ANDERSON,
Attorney General of Virginia and Counsel for Appellees and Defendants in Error.

191 [Endorsed:] File Nos. 18,783 & 18,784. Supreme Court U. S. October term, 1903. Term Nos. 189 & 190. Wm. H. Jones *et al.*, *vs.* A. J. Montague, governor, *et al.* Wm. S. Selden *et al.*, *vs.* A. J. Montague, governor, *et al.* Stipulation of counsel as to printing of records. Filed August 6th, 1903.

Endorsed on cover: File No. 18,784. E. Virginia C. C. U. S. Term No. 190. William S. Selden, William H. Anderson, and Clarence B. Gilpin, appellants, *vs.* Andrew J. Montague, governor of Virginia; David Q. Eggleston, secretary of the Commonwealth of Virginia; Morton Marye, auditor of public accounts of Virginia, *et al.* Filed January 13, 1903.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 189.

WILLIAM H. JONES, JOHN HILL, AND EDGAR POE LEE, Plaintiffs in Error,

vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA; D. Q. EGGLESTON, SECRETARY OF THE COMMONWEALTH OF VIRGINIA; MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS OF VIRGINIA, AND OTHERS, Defendants in Error.

WRIT OF ERROR.

No. 190.

SELDEN, *et als.*,

Appellants,

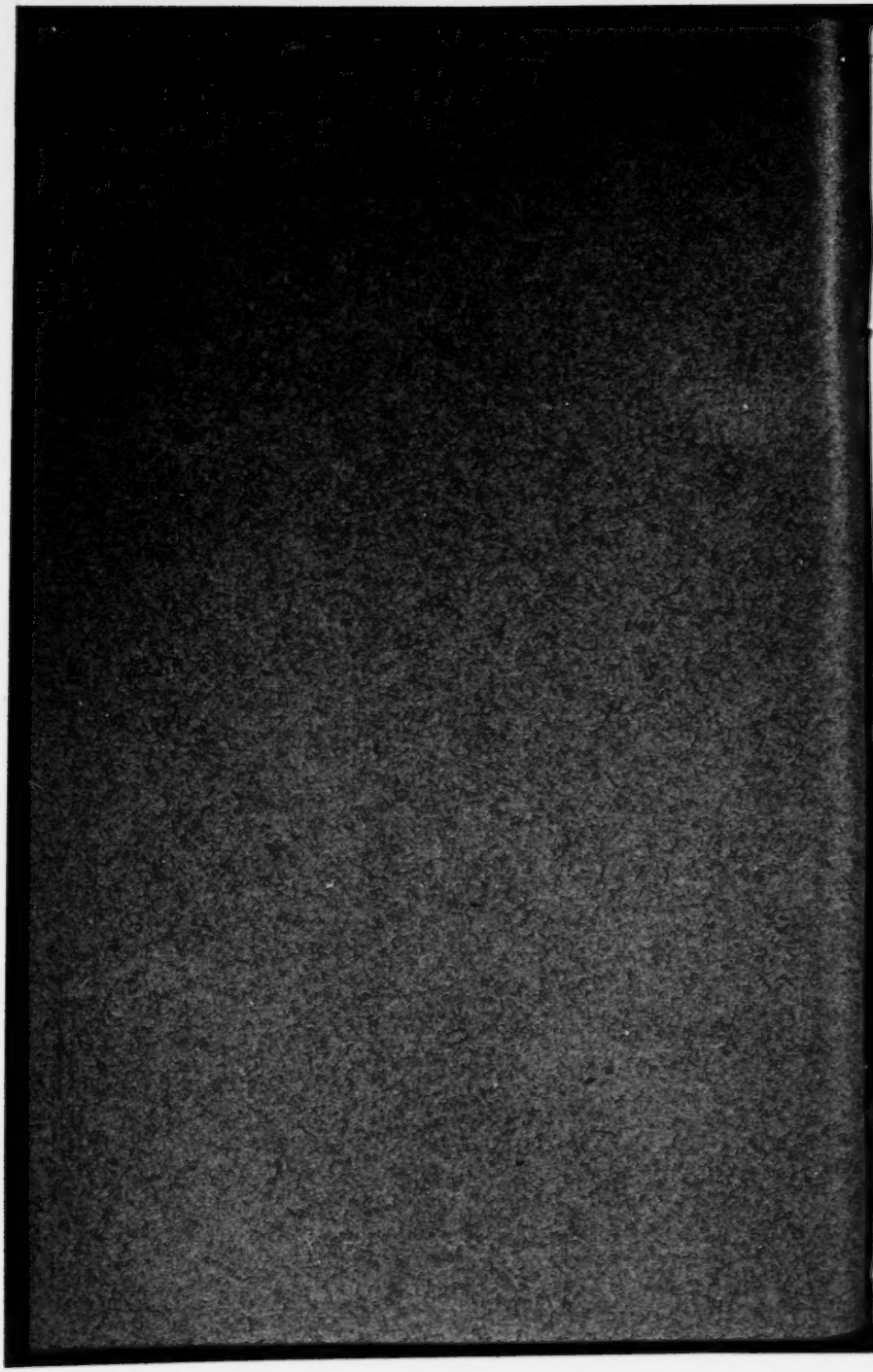
vs.

MONTAGUE, *et al.*,

Appellees.

APPEAL.

BRIEF FOR PLAINTIFFS IN ERROR ON MOTION TO DISMISS THE WRIT OF ERROR IN THE PROHIBITION CASE, AND FOR THE APPELLANTS ON THE MOTION TO DISMISS THE APPEAL IN THE SUIT BROUGHT FOR INJUNCTION.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1903. No. 189.

WILLIAM H. JONES, JOHN HILL and EDGAR POE LEE, Plaintiffs in Error, vs. ANDREW J. MONTAGUE, Governor of Virginia; D. Q. EGGLESTON, Secretary of the Commonwealth of Virginia; MORTON MARYE, Auditor of Public Accounts of Virginia, and others, Defendants in Error.	Writ of Error.
SELDEN, *et als.*, vs. MONTAGUE, *et al.*	No. 190. Appeal.

Brief for Plaintiffs in error on Motion to Dismiss the Writ of Error in the Prohibition Case, and for the Appellants on the Motion to Dismiss the Appeal in the Suit brought for injunction.

As the point raised in both of these cases is identical, this brief is filed in both.

I. The motion to dismiss is founded upon a misapprehension of the character of the relief sought in the two proceedings. The fact that the Board of State Canvassers, after the decisions, did a particular act, does not destroy either the substance of the petition or complaint, or the continuing character of the injury sought to be redressed.

II. Both the bill and the petition sought relief from the continuing oppression of a conspiracy, to which the defendants were parties.

III. The conspiracy averred was an agreement between this Board of Canvassers and others, first to have enacted and then to recognize as laws a series of invalid null enactments, schedules and ordinances; and so recognizing them, to do a series of unlawful acts under color of those invalid laws.

IV. The effect of the operations of the conspiracy upon the plaintiffs and the class on behalf of which the petition and complaint were exhibited, was to disregard their lawful registration and right to vote, and the laws permitting them to do so; to make up unlawful voting lists, from which they were excluded; to hold unlawful elections, in which they were not allowed to participate; to have the false returns so made up, certified to this State Board of Canvassers, and to have these defendants, as participants in the conspiracy, recognize those false returns as lawful and compute results from them.

V. The substance of the complaint was the existance of this conspiracy, to which the defendants were parties; the allegation that not only in this particular instance, but in every future case, unless restrained, they would recognize these laws as valid and continue to ignore the rights of the plaintiffs and petitioners.

VI. The substance of the injury complained of was not the single threatened act of counting the returns

of that particular election, but the threatened recognition by the defendants, as the law of the State, of invalid acts, ordinances and schedules of a convention, for their guidance then and thereafter; under which recognition the class complaining would then and thereafter be deprived of their voice in the political affairs of the State.

VII. The prayer of the bill and of the petition was in substance not only to restrain and prohibit the doing of the particular act then threatened, but to declare the laws, schedules and ordinances invalid then and thereafter; to perpetually enjoin this Board from proceeding then or thereafter to compute returns made up under the invalid laws, schedules and ordinances; to declare the law invoked as the warrant of their action to be null, void and of no effect; and to compel them to compute then and thereafter only returns which had been made of votes cast and certified under the valid laws of the State.

VIII. The law complained of was a continuing law; the injury complained of was a continuing injury; the test of the validity of the law, while it arose on an attempt to prevent that particular act, cannot be evaded, if the decision below was erroneous, by pleading that the particular act complained of has been accomplished before the error is reversed.

If the law was invalid; if the defendants were part of a conspiracy to treat these void laws as valid; and if the erroneous decision left them in a position to continue their injuries against the complainants, under an invalid law; it is no answer to the prayer of the complainants, praying for adjudication on the law, which, so long as it stands, continues to injure them, that before it could be adjudged null, they were subjected to one injury under its operation. Being a continuing law, it is a continuing injury, and the opportunity is recurring to these defendants to do these complainants other and continuing injuries under it until and unless the defendants are enjoined.

IX. The appeal should not be dismissed, because, before it was made effectual, the first injury was accomplished to the complainants, and it is manifest that if it was an injury, it is only the first of a series of injuries to be inflicted upon them, unless the defendants are enjoined. The case is not at all like those in which a single act is the subject of injury. The defendants are a continuous body, with continuous duties of identically the same character as each function is performed, and those duties are dependent for their validity upon the validity of the law under which the returns are made to them. The rights of the parties complainant are continuous rights and rights of a recurring nature of which they are deprived at recurring intervals, so long as the defendants are allowed to invoke and act under a void law. If those laws are invalid, it would be impossible, upon the contention of the defendants, to test them, so long as the Court below should continue to decide in defendants' favor; for each time a bill or petition was exhibited the writ would be denied, the act would be done and nothing would be left to bring up here, if the point of defendants be well taken.

X. The wrong complained of in these cases was and is a continuing wrong, to-wit: The recognition by the defendants of an invalid law as the guide of their action.

XI. The injury complained of is a continuing injury, to-wit: The deprivation to the class suing, of their rights as voters; a deprivation made effectual through the recognition by the defendants of the invalid laws, which it is sought to impeach; a deprivation which is continuing until they are declared invalid by the Court of last resort.

For which reason the motion should be denied.

JNO. S. WISE,
For Petitioners and Complainants.

In the Supreme Court

Sellers and Others

against

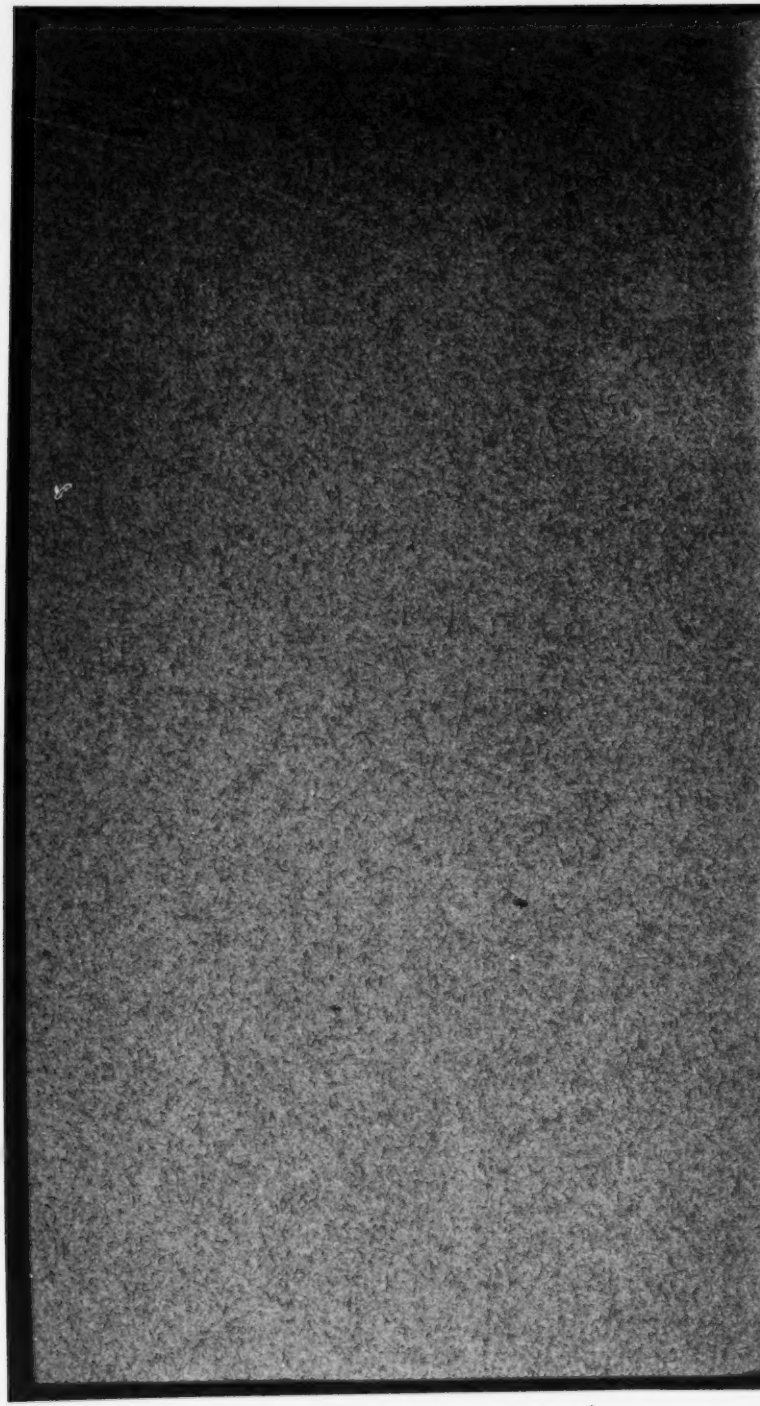
The Board of State Canvassers

Jones and Others

against

The Board of State Canvassers

BRIEF OF JOHN S. WISE ON BEHALF OF COMPLAINANT.



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IN THE

United States Supreme Court.

SELDEN and others, against THE BOARD OF STATE CANVASSERS.	In Equity on appeal from Cir. Ct. U. S. E. Dist. of Va.
JONES and others, against THE BOARD OF STATE CANVASSERS.	In Prohibition. On writ of Error from Cir. Ct. U. S. E. Dist. Va.

Brief of John S. Wise on behalf of Complainant.

Statement of the Case.

This litigation arises upon proceedings instituted by citizens of the United States, who are citizens, residents and voters of the State of Virginia, and claim that under color of certain ordinances and the alleged constitution of Virginia, ordained by a convention

which assembled June 12, 1901, in Richmond, and the schedules thereto annexed, and under a proclamation of the Governor of Virginia and certain proceedings of so-called registration boards and officers of election, they have been subjected, or caused to be subjected, to the deprivation of their rights, privileges and immunities secured by the constitution and laws of the United States and of the State of Virginia.

The two causes may be argued and decided together.

The Pleadings.

The bill in the one case, and the petition in the other, the allegations of which are to be treated as true in the form in which the cases come up, state the following causes of action:

That complainant and petitioners are voters and taxpayers of Virginia, and sue on behalf of the class they represent.

That they are, and were at the time of the committing of the grievances set forth citizens of the United States and citizens and residents of the State of Virginia, as Federal Courts are constituted.

That they are lawful voters of the State of Virginia, and, as such, entitled to vote for a Congressman for the Third District of Virginia, as the Congressional Districts of said State are now constituted, at a general election for members of the House of Representatives of the United States, which should have been held, according to law, in the State of Virginia, Tuesday, November 4th, 1902.

That they, and each of them have heretofore, for periods varying from thirty-seven to one year, been citizens, residents and lawful voters of the Common-

wealth of Virginia, under Article 3, Section 1, of the Constitution of Virginia, which was ratified by the vote of the people of that State July 6th, 1869, and under Chapter VIII, Section 62, of the Code of Virginia, of 1887, enacted by the General Assembly of Virginia, in the year 1881, (Acts 1881-2, C. 203, p. 214.)

That said Constitution became the organic law of the State of Virginia under circumstances hereinafter set forth.

That among other provisions of said constitution are the following:

> "Art. III. Elective franchise and qualifications for office.
>
> "Sec. 1. Every male citizen of the United States twenty-one years old, who shall have been a resident of this State twelve months, and of the country, city, or town in which he shall offer to vote three months next preceding any election, shall be entitled to vote for members of the General Assembly and all officers elected by the people."

The only classes of voters excluded by said constitution from exercising the right of franchise were:

1. Certain designated officers, soldiers, seamen or marines.

2. Idiots and lunatics.

3. Persons convicted of bribery in elections, embezzlement of public funds, treason, felony, or petit larceny.

4. Persons who had fought a duel or sent or accepted a challenge, &c.

> "Article XII. Future changes in the Constition.
>
> "Sec. 2. At the general election to be held in the year 1888, and in each twentieth year

> thereafter, and also at such time as the General Assembly may by law provide, the question, 'Shall there be a convention to revise the Constitution and amend the same?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such convention; provided, that no amendment or revision shall be made which shall deny or in any way impair the right of suffrage, or any civil or political right as conferred by this constitution, except for causes which apply to all persons and classes without distinction."

That complainants and petitioners having freedom and the right of suffrage guaranteed to them; by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States; by the fundamental conditions of the Act of Congress of January 26, 1870; by the Constitution of Virginia, adopted in 1869; and by the law of Virginia, of 1881, above cited; have hitherto continuously enjoyed said franchise uninterruptedly until November 4th, 1902. That they can read and write; are owners of real and personal property in Virginia; have a visible permanent interest in, and identity with, the State, in which they were born or have resided the greater portion of their lives; have committed no offense; and are colored citizens.

That in the year 1900, a political party called the Democratic party, held complete control of the executive and judicial offices of Virginia, and had a large

majority in both branches of the legislative department. That, being so in control, the Democratic majority of the General Assembly passed an act, approved March 5th, 1900, submitting to the people of Virginia the question, "Shall there be a convention to revise the Constitution and amend the same?" at a general election to be held upon the fourth Thursday in May, 1900.

That in every method and by all the representative utterances through which political parties give pledges, the Democratic party of Virginia assured the voters of Virginia that, if they voted in favor of said convention, any revised and amended constitution which might be framed thereby would be submitted to the voters of Virginia for ratification or rejection. And they verily believe and charge that a vast majority of those who voted in favor of said convention were induced thereto by these assurances, given by every representative politician, by the press and by party conventions of all political parties in the State.

That at the election held in May, 1900, the popular vote favored said convention, and was duly certified to the next General Assembly, which passed an act February 16, 1901, reciting that it was then proper to provide plans for the selection of the delegates to such convention, for the convening of said delegates and the organization of the State convention, *and for submitting the revised and amended constitution to the people of the State of Virginia for ratification or rejection.*

That said act provided for electing delegates to said convention on the fourth Thursday in May, 1901, and for the assembling of the convention June 12, 1901. It was further enacted that if the convention completed its work before October 5, 1901, the constitution framed

by it should be submitted to the qualified voters of the Commonwealth as a whole, or by separate articles or sections, as the convention might determine, for ratification or rejection, at the general election to be held November 5, 1901; and that, if the work of said convention was not finished before October 5, 1901, it should remain for the next General Assembly to enact such measures as it should deem proper, for submitting said constitution to the people of the State for ratification or rejection.

That said convention assembled June 12, 1901, and pretended to organize, but a majority of the delegates elected thereto then and there refused to take or subscribe any oath of office, in violation of Art. III, Sec. 5, of the Constitution of Virginia, which reads:

> "Sec. 5. All persons, before entering upon the discharge of any function as officers of this State must take and subscribe the following oath or affirmation:
>
> "I, ————do solemnly swear (or affirm) that I will support and maintain the Constitution of the United States, and the Constitution and laws of the State of Virginia; that I recognize and accept the civil and political equality of all men before the law, and that I will faithfully perform the duty of ———— to the best of my ability; so help me God—."

And that no members of said convention ever qualified as such.

Whereby, as complainants insist and charge, all the proceedings of said convention were null, void and of no effect.

That, nevertheless, said convention did attempt to act and did remain in session until June 26, 1902, when it adjourned *sine die*, after pretending to ordain a con-

stitution consisting of sixty-five pages of printed matter, eight pages of schedules, and twenty-four pages of registration ordinances, all of which are annexed to the bill and the petition as part thereof. marked Exhibits A, B, and C.

That, notwithstanding, the political pledges above referred to, and the requirements of the Act of Assembly aforesaid, that the work of said convention should be submitted to the voters of Virginia for ratification or rejection, a bare majority of a quorum of said convention, refused to submit the said proposed revision and amendment of the Constitution to the people of Virginia, or to leave the manner of its submission for ratification or rejection to the next General Assembly of the State.

That the convention consisted of One hundred delegates.

That the proposition to submit the amended and revised constitution to the electorate as constituted under the laws theretofore in force, was rejected by a vote of—ayes, 33; noes, 52.

That the proposition to submit it to the electorate provided for in said revised and amended constitution was rejected—ayes, 24; noes, 58.

And the proposition, "Shall the Constitution framed by this body be ordained by this convention?" was sustained by a vote of—ayes, 47; noes, 38.

That the affirmative vote by which this was accomplished was less than a majority of the whole convention.

That forty-seven members of said convention attempted; in violation of every pledge given by their party; without any constitutional or statutory authority to act definitively; in definance of the law under which they were assembled; to impose upon the voters

of Virginia, as the organic law of the State, a constitution embodying many subjects never heretofore embraced in any constitution of Virginia; never submitted to the voters of Virginia for their approval; and framed and intended to disfranchise two-fifths of the voters who elected the delegates to the convention, or as many as the appointed agents of said dominant faction should thereafter see fit to deprive of suffrage.

That the design last referred to is manifest in sundry devices inserted in said Constitution under pretense of guarding the electoral franchise, as follows:

That under the Constitution and laws of Virginia, as they existed when said convention was assembled, the lawful voters of Virginia, that is to say, every male citizen of the United States, twenty-one years of age, who had been a resident of the State of Virginia twelve months, and of the county or town in which he offered to vote, three months next preceding any election, was entitled to vote provided he was duly registered.

That the registration laws of the State of Virginia then in force, provided for a registrar in every election district of all the counties and cities of the State, who held his office for a fixed term, which had not expired when said convention attempted to enact the unlawful measures hereinafter stated. Any voter of the Commonwealth might apply to said registrars for registration, and they were required annually, in May and October, to designate a time and place at which lawful voters might be registered.

Both the complainants and the petitioners aver and charge that the dominant faction in said convention wilfully and deliberately planned to destroy the electorate fixed by the then existing constitution of Virginia, and to that end attempted to repeal the regis-

tration law above named, without submiting such action to the people, and contrary to the powers of said convention.

That after incorporating into the proposed constitution as Article I, thereof, a bill of rights, which is a mockery of the liberties recited, when contrasted with what follows it, said convention, under Article II, headed, "Elective franchise and qualifications for office," attempted to define and fix the qualifications of electors. Pretending to give a vote to every male citizen of the United States, resident in Virginia, twenty-one years of age, said section increased the term of residence of voters in the State to two years, and in the county, city or town to one year, and in the precinct where the citizen offers to vote to thirty days. To those primary qualifications it added requirements that such voters should be registered and should have paid a State tax. Superadded to these and annulling said pretended broad grant of franchise, was the requirement that there should be a new general registration in all the counties, cities and towns of the State during the years 1902 and 1903, *at such times and in such manner as might be prescribed by an ordinance of said convention.*

That, in violation of all precedent or authority, and contrary to law, the dominant faction in said convention thereupon, or shortly thereafter, passed an ordinance entitled, "to provide for the registration of voters under said Constitution and prior to the year 1904." by the provisions of which registration was ordered, not in the voting districts as provided by laws of Virginia then in force, but in the several magisterial districts of every county and in the wards of every city, thereby changing the territorial areas of registration districts and increasing the physical difficulties of registration.

It provided that said general registration should take place prior to the 15th day of October, 1902, and again prior to the 15th day of October, 1903, that the registrars should consist of a board composed of three citizens, resident in such district or ward, appointed by said convention; whereby it undertook to change the time for holding registrations, the appointing power and the number of registrars. It restrained said boards from registering any persons who applied for registration, except those *entitled to register under said Constitution prior to January 1, 1904*, and gave said boards power to administer oaths and examine under oath any applicants and witnesses; to receive evidence and hear testimony touching qualifications for registration. It further made the act of the majority of the board the act of the board itself. It provided for the delivery of the lists of persons so registered to the judges appointed at such precinct to conduct said election, and provided for the prosecution for perjury of any person examined by said boards. It gave the right of appeal to a rejected voter to the county or corporation Court, and thence to the Supreme Court of Appeals, and after sundry other detailed provisions, in order to make more effectual the plans of disfranchisement settled upon by the dominant faction, it descended to the appointment of three designated individuals in every magisterial district of the counties and in every ward of the cities in the Common wealth of Virginia, who could be relied upon as partisans of said faction to carry out its plans; whereby no one but the persons which it intended should be registered and allowed to vote would be placed upon the registration lists in any magisterial district or ward of the State of Virginia.

That with the machinery thus provided, and regis-

tration exclusively under control of its appointees, the dominent faction in said convention enacted into the Constitution itself that its appointees should only register such voters of Virginia as presented themselves to them and were citizens of the United States, having the qualifications of age and residence aforesaid and possessing the following additional qualifications:

(1) Certain soldiers; (2) any son of such soldier; (3) owners of property, upon which, for the year next preceeding that in which they offered to register, they had paid at least one dollar of State taxes; (4) persons able to read any section of said Constitution submitted to them by said officers of registration and to give a reasonable explanation of the same; or, who, if unable to read such section, were able to understand and give a reasonable explanation thereof when read to them by the officers.

That the language aforesaid, purporting to admit every male citizen of the United States, as provided in the Constitution of 1869, and entitled by the fundamental conditions of the Act of Congress to register, was a mere pretence of granting the right to register, for it was coupled with the proviso that such right should only exist when the applicant possessed the other qualifications last hereinabove named. That the Act of Congress of Jany. 26, 1870, expressly forbade the curtailment of right of suffrage in that manner. So also do the fourteenth and fifteenth amendments to the Constitution of the United States. So also does the Constitution of Virginia of 1869, and the laws enacted pursuant thereto. That the first and second conditions aforesaid were plainly obnoxious to that clause of the bill of rights, which forbids the granting of special privileges to any man or set of

men, or granting privileges as descendible for services of an ancestor.

That the third condition relating to the ownership of property on which taxes had been paid for the preceding year was likewise unconstitutional and void.

That the fourth proviso, whereby the right of any citizen to exercise his franchise in Virginia was made dependent upon the judgment or caprice of partisan appointees, violated every idea of democratic constitutional liberty.

That the autocrat of the Russian Empire has no more absolute mastery over the political forces of his empire and is no more potent to control in perpetuity the membership and organization of every representative body in his realm, or the incumbency of every office in his dominions than has the dominant faction of said convention in Virginia, if said ordinance and Constitution are valid.

That the schedule by which it was sought to put said pretended constitution into effect provided that certain lawful electoral boards existing in Virginia prior to the convening of said convention and to which electoral boards the appointment of judges of election and registration had been delegated by existing laws should remain in office until March 1, 1904, with all the powers conferred by existing laws, *except the appointment of registrars.*

That said schedule further provided that in all elections held after said pretended constitution went into effect, the qualifications of electors should be those set forth in Article II. of said pretended constitution.

That it further provided that said Constitution should go into effect on the 10th day of July, 1902, at noon, and directed the Governor of Virginia to immediately issue his proclamation, announcing that said re-

vised and amended Constitution had been ordained by the people of Virginia, assembled in convention through their representatives, as the constitution for the government of the people of the State, and that it would go into effect as such subject to the provision of said schedule on the 10th day of July, 1902, and to call upon the people of Virginia to render their true and loyal support to the same as the organic law of the Commonwealth.

That it required that when the General Assembly should convene on the 15th day of July, 1902, as it had been summoned to convene, its members and officers, before entering upon the discharge of their duties, should severally take and subscribe the oath of affirmation prescribed by section 34 of said Constitution, which was an oath to support the Constitution of the United States and the Constitution of the State of Virginia ordained by the convention which assembled in the City of Richmond on the 12th day of June, 1901.

That it further required the Governor of Virginia, and all other executive officers of the State, whose offices are at the seat of government, and all judges of courts of record, to severally take and subscribe such oath of affirmation under a penalty of vacation of their offices.

That the Governor of Virginia did forthwith make proclamation as directed by said schedule, and that the Governor of Virginia, Andrew J. Montague, and all the other executive officers of the State, whose offices are at the seat of Government, and all the Judges of Courts of Record, took and subscribed the oath required by said schedule, whereby they undertook to support the said alleged Constitution, and that the members of the General Assembly, when it assembled

on the 15th day of July, 1902, with the exception of one or two members, took and subscribed said oath.

That the passage of said ordinance creating said boards of registration; the appointments by said convention of the individuals composing said registration boards; the attempted additional qualifications upon the right of suffrage set forth in Article II., section 19, of said pretended constitution, and especially said fourth qualification; and the attempts to ordain and proclaim said constitution without submitting it to the people of the State, are each, all and every one of them in violation of the rights of complainants, destructive of complainants' franchises, ruinous to complainants' property as placing it subject to the control of a spurious and false electorate; in violation of the XIVth and XVth amendments of the Constitution of the United States; in violation of the Act of Congress of January 26, 1870; in violation of the only existing Constitution of Virginia, which was ratified by the people of Virginia July 6th, 1869, and the laws enacted pursuant thereto; and that each, all and every one of said attempted acts, ordinances, appointments, constitution and schedule are null, void and of no effect.

That by means of the premises the Governor of Virginia and all other executive officers of the State, the Judges of the Courts of Record of said State, and the members of the General Assembly of said State, have united in an attempt to abandon the government of Virginia under which they were elected to office, and that they and each of them have, in violation of their duties to the people who elected them, and in conspiracy with the dominant faction in said convention, attempted to ordain and proclaim said Constitution and to impose the same upon the people of Virginia con-

trary to their will, without giving them an opportunity to be heard, well knowing the people would never ratify the same; and that said actions and doings are in violation of the Constitution and laws of the United States and of the State of Virginia.

That many of the members of said convention, who voted in favor of ordaining and proclaiming said constitution, boldly avowed the purpose in framing the same, to disfranchise the great body of the colored voters of Virginia; and that however cunningly the devices contained in said instrument may be concealed, the real purpose of the dominant faction which framed and promulgated said so-called Constitution was to disfranchise the colored voters of Virginia on account of their race and color; a purpose which will be fully accomplished unless restrained.

That many members of the dominant faction in said convention, who voted in favor of ordaining and proclaiming said so-called Constitution, openly and boldly declared that they knew said Constitution would never be ratified and approved by the voters of Virginia, if it was submitted to them for ratification or rejection, and that, in voting to ordain and proclaim the same, they did so, knowing full well that by that means alone, if at all, could said Constitution be imposed upon the people of Virginia.

That the government of Virginia having passed, by the methods above recited, from under the lawful Constitution adopted by the people in the year 1869 to a government under said so-called Constitution, the Government now existing in Virginia is unlawful, notwithstanding many of the incumbents of office therein may have been lawfully elected to the offices which they hold.

That after the Governor of Virginia had proclaimed

said Constitution, and the other executive officers and judges of courts of record and members of the General Assembly had attorned to said so-called new Constitution, as hereinabove set forth, the registration boards appointed by the ordinance of said convention held their sessions and made up their enrollments in the various magisterial districts and wards of the Commonwealth; that in every section of the State of Virginia the action of said registration boards was as partisan and unconstitutional and outrageous as might have been expected under the circumstances of their appointment; that said boards hastened in many sections of the Commonwealth to place upon said registration rolls the names of every white male citizen of the United States resident in their respective bailiwicks possessing the qualifications of age and residence, and who was believed to be a Democrat; that the said boards made little or no effort to ask such white persons to read any section of said Constitution or to give a reasonable explanation of the same, but quickly and cheerfully admitted all such to registration; that said boards, on the contrary, only permitted colored voters to apply for registration at stated times and places, and that when such colored persons presented themselves said boards proceeded at once to ask complicated, difficult and unnecessary questions, and that, even in cases where such questions were answered intelligently, applicants for registration were rejected by said boards, which held that the answers and explanations given were not reasonable; and complainants aver that by means of the premises thousands of lawfully qualified citizens of Virginia, who applied for registration to said registration boards, have been rejected by them, and that many other thousands of voters

either refused to recognize said boards as lawfully convened, or were deterred from applying to them by their notoriously partisan and arbitrary exercise of the unconstitutional powers entrusted to them.

(Then follows in each case a statement of the particular manner in which the individual complainants in the one case, and the individual petitioners in the other case, were denied registration and opportunity to vote, under the maniplations of the local board of registration to which they applied, although they were qualified and had theretofore, for a long period, exercised the right of suffrage).

That the registration lists made up by the registration boards appointed by said convention became and were and are, not only the unlawful registration lists of the Congressional electorate of Virginia, but are, as they were intended to be by the faction which designated said registration boards, merely partisan, partial, lists of the lawful electorate, containing only such names as the appointees of said convention saw fit to enroll, and excluding therefrom lawful electors of Virginia to the number of at least 100,000 in the State, and in this Congressional district.

That under the laws passed by the Congress of the United States and lawfully enacted in Virginia prior to the assembling of said Convention of the State of Virginia, an election for Congressman from the ten Congressional districts of Virginia should have been held in the State of Virginia upon Tuesday, November the 3rd, 1902. By reason of the unlawful conspiracy aforesaid between the lawfully elected officers of Virginia and the dominant faction in said convention, and its appointees, no such election was held. That writs of election were issued by the Governor of Virginia, in the form prescribed by law, but in taking such ac-

tion he pretended to act under the Constitution unlawfully proclaimed by him as aforesaid. That Judges of election at the several voting precincts of the State of Virginia were appointed for said election by the electoral boards of their several counties and cities, but the electoral boards and judges aforesaid did not take the oath to support the lawful Constitution of Virginia, and only took the oath to support said spurious Constitution; and that whatever color of authority said electoral boards may have had to appoint said judges, by reason of their having been selected prior to the attempted proclamation of said Constitution, said attempted elections were null, void and of no effect, for the further reason that the lawfully registered voters of the Commonwealth were denied the right of suffrage, and the lawfully enrolled registration lists were excluded from said elections; and, on the contrary, the only registration lists used by said judges, or upon which any applicant for the right to exercise suffrage was permitted to vote, were spurious and unlawful registration lists made up by the illegal and partisan registration boards designated by the ordinance of said convention; whereby said elections for Representatives in Congress were conducted in violation of the laws of the State of Virginia in all respects, without the registration lists required by law; without the officers conducting same having taken the oaths required by law; and that said pretended elections were and are null, void and of no effect.

That at said election the candidates for Congress in the Third Congressional district aforesaid were as follows:

John Lamb was the candidate of the Democratic party, and Wm. E. Talley and B. W. Edwards were the candidates of the Republican party. That the

votes cast at said pretended election were not published, but whatever the said pretended returns of votes cast may be, it was a foregone conclusion before said illegal election was held, that said Democratic candidates would receive a very large vote, and said Republican candidate would receive a very small vote, because by the partisan and unlawful methods by which the registration lists were made up the Democratic voters in the district were placed upon said lists and as many Republican voters were excluded therefrom as the partisan registration boards saw fit to exclude.

That under the laws of Virginia enacted prior to the convening of said convention, and still recognized as in force by the Schedule of said Constitution, the Governor of Virginia, the Secretary of the Commonwealth, the Auditor of Public Accounts, the State Treasurer and Attorney General, or any three of them, are constituted a Board of State Canvassers. The present incumbents of these offices are as follows, to-wit:

Andrew J. Montague is the Governor of the State of Virginia.

David Q. Eggleston, Secretary of the Commonwealth.

Morton Marye, Auditor of Public Accounts.

Asher W. Harman, Jr., State Treasurer and William A. Anderson, Attorney General.

That after each election the judges of each voting precinct are required by law to make up the returns of the vote cast in their respective precincts, and transmit them to the Clerk of the County or Corporation in which the election is held. The electoral board of each county and city, when it appoints election judges, designates five of the persons so appointed to act as Commissioners, who, or any three of whom, constitute

a board, of which the Clerk of the County, Corporation or Hustings Court is ex officio clerk. That these commissioners meet at the Clerk's office of their respective Counties or Corporations on the second day (which in this case is Thursday, November 6th), after the election, and upon the precinct returns made to the Clerk's office, said Commissioners ascertain the persons who have received the greatest number of votes in the County or Corporation for the several offices to be filled at said election. The Clerk is required to make out abstracts of the votes, and said abstracts certified and signed by said Commissioners and attested by the Clerk, are deposited in the Clerk's office and certified copies thereof, under the official seal of the Clerk, are transmitted to the Secretary of the Commonwealth.

That, in the case of elections for Representatives in Congress, the Secretary of the Commonwealth, upon receipt of the certified abstracts of the votes given in the several counties and corporations constituting a Congressional district, is required to proceed to open the same and record them in a suitable book, and to preserve in his office said abstracts for the purpose of canvassing the results of elections.

That said Board of State Canvassers is required to meet at the office of the Secretary of the Commonwealth on the fourth Monday in November after the election (which in the present year is Monday, November the 24th), when, upon the certified abstracts on file in the office of the Secretary of the Commonwealth, it is required to proceed to examine and make statement of the whole number of votes given at such election for Representatives in Congress, which statement shall show the names of persons for whom such votes have been given for said office, and the whole number given

to each, distinguishing the several districts, cities and counties in which they were given. It is also required to certify the said statement to be correct and the members of said board must subscribe their names thereto, and said board is required to thereupon determine what persons have been by the greatest number of votes duly elected Congressmen from the ten several Congressional districts of Virginia, and to indorse and to subscribe on such statements a certificate of such determination, and deliver them to the Secretary of the Commonwealth. That the Secretary of the Commonwealth is required to record in a suitable book each certified statement or determination as made by the Board of State Canvassers, and without delay make out and transmit to each of the persons thereby declared to be elected a certificate of his election certified by him under his seal of office.

That each, all and every one of the proceedings had and taken by the Governor of Virginia, the Secretary of the Commonwealth, the several electoral boards in the State of Virginia, the Judges and Clerks of election, and all the other officers, to whom duties concerning elections are committed by the laws of Virginia, have, in so far as they relate to the election required by law to be held in the State of Virginia November 3, 1902, for Representatives in Congress of the United States, been null, void and of no effect; that each, all and every one of said proceedings have been contrary to the law, in violation of complainants' rights, and unconstitutional; and that no election for Representatives in Congress was held in the State of Virginia November 3, 1902.

That complainants and petitioners are advised that the judges of election appointed in and for the several election precincts in all the Congressional districts of

Virginia did pretend to hold such an election November 3rd, 1902; that said precinct judges did certify to the Clerks of their respective counties the votes which were cast thereat on the day aforesaid; that the Boards of Canvassers in the several counties and cities in said several Congressional districts did assemble at their respective court houses upon the 6th day of November, 1902, and did certify abstracts of the votes cast in their counties and cities respectively to the Secretary of the Commonwealth at Richmond, Virginia, and that said Board of State Canvassers will assemble at the capital upon the 24th day of November, 1902, and will, then and there, unless restrained from so doing, proceed to treat said pretended election as if it were a lawful election, and will from the spurious certified abstracts on file in the office of the Secretary of the Commonwealth proceed to examine and make up statements of the whole number of votes given at said spurious election for Representatives in Congress, and to certify such statements to be correct, and to subscribe their names thereto, and to determine what persons had been by the greatest number of votes duly elected to such offices, and to endorse and subscribe on such statement a certificate of such determination and to deliver them to the Secretary of the Commonwealth; and that said Secretary of the Commonwealth will, unless restrained from so doing, record said certified statement of determination, and without delay make out and transmit to each of the persons thereby declared to be elected a false and spurious certificate of his election as a representative in Congress certified by him under his seal of office.

That such action on the part of said Board of State Canvassers would do the complainants and petitioners great and irreparable injury; that the injury to them is

great because the action of said Board of State Canvassers, if permitted to be taken, will give effect, as laws, to enactments, proclamations and proceedings, which control and govern the persons and the property, the liberties, the franchises and immunities, of complainants, which enactments, proclamations and proceedings have never been and are not valid or binding upon complainants, or upon any citizens of Virginia. That said injury is irreparable because it is of such a character that, unless it is restrained it can never be repaired. That they are freemen and voters and taxpayers in their community, and the damage done to them by these spurious and invalid proceedings, which deprive them of their franchises, take away the liberty guaranteed to them by the Constitution of the United States, and give them no voice in the government which taxes them, is an injury which is irreparable even if it should be permitted to exist for a single minute.

THE PRAYER OF THE COMPLAINANTS IN THE BILL WAS AS FOLLOWS:

Forasmuch as complainants are remediless in the premises, save in a Court of Equity, wherein such matters as are hereinabove set forth are properly cognizable and relievable, therefore complainants pray that Andrew J. Montague, the Governor of Virginia, David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia; Asher W. Harman, Jr., State Treasurer of Virginia, and William A. Anderson, Attorney General of Virginia, constituting the Board of State Canvassers as defined in the Code of Virginia, 1887, section 139, be made parties defendant to this bill and duly summoned to answer the same; that this Honor-

able Court shall examine into and determine whether the said pretended Constitution of Virginia, passed by the Convention which assembled at Richmond on July 12th, 1901, and the schedule thereto annexed, and the ordinance passed by said convention entitled, "An Ordinance to Provide for the Registration of Voters Under This Convention Prior to the Year 1904," and the proclamation of the Governor of Virginia based thereon, and the subsequent proceedings of the Executive, Judicial and Legislative Departments of Virginia, based thereon, or any of them, are or ever have been lawfully enacted, or have become obligatory and binding upon the people of Virginia; and whether, even if said Constitution, schedule and ordinance were enacted according to the forms of law, they are not, nevertheless, null, void and of no effect, as contrary to the Constitution and laws of the United States. That this Honorable Court having decided that the said laws are null, void and of no effect, and that any election held under them is likewise void, will perpetually restrain and enjoin said State Board of Canvassers and each and every member thereof from considering or passing upon the returns of said pretended election held November the 4th, 1902, in the State of Virginia for Representatives in Congress, the same not having been held in accordance with law and being null, void and of no effect; and that the said Board of State Canvassers be perpetually restrained from passing upon said returns; and that the Secretary of the Commonwealth be perpetually restrained and enjoined from making out or transmitting to any of the persons who were candidates for election for the House of Representatives of the United States at a pretended election held in Virginia November 4th, 1902, any certificate of election certified by him under his seal of office;

and inasmuch as the final determination of said questions by his Honorable Court may be delayed beyond the 24th day of November, 1902, complainants pray for a restraining order against said Board of State Canvassers, and each and every member thereof, in the nature of a temporary injunction, forbidding them and each of them from taking any proceedings whatsoever upon the certified abstracts of returns of said election in the office of the Secretary of Commonwealth of Virginia, until the further order of this court can be had in this cause. And for all such other, further and general relief in the premises as to equity and your Honor may seem meet and proper under the circumstances.

AND THE PRAYER OF THE PETITIONERS FOR THE WRIT OF PROHIBITION WAS AS FOLLOWS:

Wherefore your petitioners pray that this Horonable Court will issue or cause to be issued a writ of prohibition, directed to and against said Andrew J. Montague, who is Governor of Virginia; David Q. Eggleston, who is Secretary of the Commonwealth of Virginia; Morton Marye, who is Auditor of Public Accounts of Virginia; Asher W. Harmon, Jr., who is State Treasurer of Virginia, and William A. Anderson, who is Attorney-General of Virginia, constituting the Board of State Convassers of Virginia, prohibiting them, and each of them, from considering, canvassing, counting, determining upon, or certifying or otherwise acting upon, any returns or abstracts of returns in the office of the Secretary of the Commonwealth of Virginia, purporting to be returns of election held in the State of Virginia, Tuesday, November 4th, 1902, for representatives in Congress from the State of Virginia, or in any wise dealing with or certifying

the results of said returns as returns of a lawful election held in Virginia on the date aforesaid. That by reason of the matters and things hereinabove set forth, said pretended election, and any and all precinct, county, district or State returns made thereunder, may be held to be null, void and of no effect, and said Board of State Canvassers, and the members thereof, may be prohibited from in any wise proceeding to act upon the same as lawfully before them for their consideration.

That pending the hearing, and until the final decision upon this petition for said writ of prohibition an order may be granted by this Honorable Court suspending any and all proceedings, on the part of said Board of State Canvassers and the members thereof, upon any and all the matters sought to be prohibited until the final decision of this cause. And for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual.

And petitioners will ever pray, &c.

Upon the above State of the law, facts, and pleadings, the two causes came on to be heard together at Richmond, Virginia, November 28th, 1902, before Fuller C. J. and Waddill J. and after argument by counsel, upon the motion of the complainants for an injunction, and of the petitioners for a writ of prohibition, both applications were denied, and both causes were dismissed, with costs, November 28th.

The memoranda, on which the decree and order were entered are as follows:

Memoranda of Chief Justice Fuller.

Equity Case—"The rule heretofore granted herein will be discharged, and the application denied, because of want of jurisdiction.

"The application is, in effect, against the Commonwealth, and the subject matter is political.

"That a Court of Equity has no jurisdiction, as such in cases within which this case falls, settled in this Circuit in Green vs. Mills, 69 Fed., 852."

Prohibition Case—"Application for prohibition, prohibiting defendants from canvassing returns of the election held November 4, 1902, for representatives in Congress, or proceeding to act on the same, and for preliminary order suspending proceedings on the part of the State Board of Canvassers. The rule heretofore entered herein is discharged, and preliminary order denied. This for want of jurisdiction. The writ is not sought in aid of jurisdiction already acquired; nor does it appear that there is no other remedy.

"The proceeding is, in effect, against the Commonwealth, which is in any view an indispensable party, and cannot be made such, and the matter being political, cannot be disposed of in such a proceeding."

Memorandum of Waddill J., applicable to both cases.

"Believing under the decisions of the courts of the United States, by which this Court is, and should be governed, that neither of the actions now before the Court can be maintained, I, for that reason concur in the result arrived at by the Chief Justice, dismissing the same, and may hereafter file a brief memorandum in writing, embodying my views.

"It is, in frankness, due however, that I should say that while I believe that this is the law, as settled by the decisions, it does not entirely embody my personal views as to what that law ought to be. I can but believe that as to rights, arising under, and guaranteed to the citizen by the constitution and laws of the United States, injuriously affecting one hundred thousand peo-

ple, whether respecting their property or their personal and political rights, and particularly the two latter classes, that they ought to be given a day in Court; afforded an opportunity for a full and speedy hearing; and to that end, that technicalities, forms and ceremonies should, in large measure, be dispensed with, speedy justice afforded, and the rights of the respective parties litigant ascertained."

The following are the extracts from the alleged Virginia Constitution, and Schedule, referred to in the pleadings and argument:

"Whereas, pursuant to an act of the General Assembly of Virginia, approved March the fifth, in the year of our Lord, nineteen hundred, the question, "shall there be a convention to revise the Constitution and amend the same?" was submitted to the electors of the State of Virginia, qualified to vote for members of the General Assembly, at an election held throughout the State on the fourth Thursday in May, in the year nineteen hundred, at which election a majority of the electors so qualified voting at said election did decide in favor of a convention for such purpose; and

"Whereas, the General Assembly at its next session did provide by law for the election of delegates to such convention, in pursuance whereof the members of this Convention were elected by the good people of Virginia, to meet in convention for such purpose,

"We, therefore, the people of Virginia, so assembled in Convention through our representatives, with gratitude to God for His past favors, and invoking His blessings upon the result of our deliberations, do ordain and establish the following revised and amended Constitution for the government of the Commonwealth.

ARTICLE I.

Bill of Rights.

A DECLARATION OF RIGHTS, made by the representatives of the good people of Virginia assembled in full and free Convention; which rights do pertain to them and their posterity, as the Basis and Foundation of Government.

Section 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.

Sec. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

Sec. 3. That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; of all the various modes and forms of government, that is best, which is capable of producing the greater degree of happiness and safety and is most effectually secured against the danger of maladministration; and, whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal.

Sec. 4. That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which not being descendible, neither ought the offices of magistrate, legislator or judge to be hereditary.

Sec. 5. That the legislative, executive and judicial departments of the State should be separate and distinct; and that the members thereof may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the va-

cancies be supplied by regular elections, in which all or any part of the former members shall be again eligible, or ineligible, as the laws may direct.

Sec. 6. That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good.

Sec. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

Sec. 8. That no man shall be deprived of his life, or liberty, except by the law of the land, or the judgment of his peers;

* * * * * *

ARTICLE II.

Elective Franchise and Qualifications for Office.

Sec. 18. Every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city or town one year, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his state poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elected by the people; but removal from one

precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

Sec. 19. There shall be general registrations in the counties, cities and towns of the State during the years nineteen hundred and two and nineteen hundred and three at such times and in such manner as may be prescribed by an ordinance of this Convention. At such registrations every male citizen of the United States having the qualifications of age and residence required in Section Eighteen shall be entitled to register, if he be:

First. A person who, prior to the adoption of this Constitution, served in time of war in the army or navy of the United States, of the Confederate States, or of any State of the United States or of the Confederate States; or

Second. A son of any such person; or

Third. A person, who owns property, upon which, for the year next preceding that in which he offers to register, state taxes aggregating at least one dollar, have been paid; or

Fourth. A person able to read any section of this Constitution, submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

A roll containing the names of all persons thus registered, sworn to and certified by the officers of registration, shall be filed, for record and preservation, in the clerk's office of the circuit court of the county, or the clerk's office of the corporation court of the city, as the case may be. Persons thus enrolled shall not be

required to register again, unless they shall have ceased to be residents of the State, or become disqualified by section Twenty-three. Any person denied registration under this section shall have the right of appeal to the circuit court of his county, or the corporation court of his city, or to the judge thereof in vacation.

Sec. 20. After the first day of January, nineteen hundred and four, every male citizen of the United States, having the qualifications of age and residence required in section Eighteen, shall be entitled to register, provided:

First. That he has personally paid to the proper officer all state poll taxes assessed or assessable against him, under this or the former Constitution, for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; and

Second. That, unless physically unable, he make application to register in his own hand-writing, without aid, suggestion or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted, and, if so, the state, county and precinct in which he voted last; and,

Third. That he answer on oath any and all questions affecting his qualifications as an elector, submitted to him by the officers of registration, which questions, and his answers thereto, shall be reduced to writing, certified by the said officers, and preserved as a part of their official records.

Sec. 21. Any person registered under either of the

last two sections, shall have the right to vote for members of the General Assembly and all officers elective by the people, subject to the following conditions:

That he, unless exempted by section Twenty-two, shall, as a prerequisite to the right to vote after the first day of January, nineteen hundred and four, personally pay, at least six months prior to the election, all state poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote; provided that, if he register after the first day of January, nineteen hundred and four, he shall, unless physically unable, prepare and deposit his ballot without aid, on such printed form as the law may prescribe; but any voter registered prior to that date may be aided in the preparation of his ballot by such officer of election as he himself may designate.

Sec. 22. No person who, during the late war between the States, served in the army or navy of the United States, or the Confederate States, or any State of the United States, or of the Confederate States, shall a any time be required to pay a poll tax as a prerequisite to the right to register or vote. The collection of the state poll tax assessed against any one shall not be enforced by legal process until the same has become three years past due.

Sec. 23. The following persons shall be excluded from registering and voting: Idiots, insane persons, and paupers; persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money

or property under false pretences, embezzlement, forgery or perjury; persons who, while citizens of this State, after the adoption of this Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such duel, either within or without this State, or knowingly conveyed a challenge, or aided or assisted in any way in the fighting of such duel.

Schedule.

That no inconvenience may arise from the adoption of this Constitution, and in order to provide for carrying it into complete operation, it is hereby ordained that:

Section 1. The common law and the statute laws in force at the time this Constitution goes into effect, so far as not repugnant thereto or repealed thereby, shall remain in force until they expire by their own limitation, or are altered or repealed by the General Assembly.

Sec. 2. All ordinances adopted by this Convention, and appended to the official original draft of the Constitution delivered to the Secretary of the Commonwealth, shall have the same force and effect, as if they were parts of this Constitution.

* * * * *

Sec. 22. When the General Assembly convenes on the fifteenth day of July, nineteen hundred and two, its members and officers, before entering upon the discharge of their duties shall severally take and subscribe the oath of affirmation prescribed by Section Thirty-four of the Constitution. And not later than the twentieth day of July, nineteen hundred and two, the Governor and all other executive officers of the State, whose officers are at the seat of Government, and all judges of courts of record, shall severally take and subscribe such oath or affirmation; and upon the failure of any such officer, executive or judicial, to take such oath by the day named, his office shall thereby become vacant. Such oaths or affirmations shall be taken and subscribed before any person authorized by existing laws to administer an oath. The Secretary

of the Commonwealth shall cause to be printed the necessary blanks for carrying into effect this provision, and the said oaths and affirmations so taken and subscribed, except of the members and officers of the General Assembly, shall be returned to and filed in his office; and those taken by the members and officers of the General Assembly shall be preserved in the records of the respective houses.

Sec. 23. The official copy of the Constitution and Schedule, and of any ordinance adopted by the Convention, shall, as soon as they shall be enrolled, be signed by the President, and attested by the Secretary of the Convention, and the President will thereupon cause the same to be delivered to the Secretary of the Commonwealth, who will file and preserve the same securely, among the archives of the State in his custody.

* * * * *

The Secretary of the Commonwealth will immediately upon the adoption of this Schedule, deliver a certified copy of the Constitution and Schedule, and of said ordinance, to the Governor of the Commonwealth.

Sec. 24. The Governor is authorized and directed to immediately issue his proclamation announcing that this revised and amended Constitution has been ordained by the people of Virginia, assembled in Convention, through their representatives, as the Constitution for the government of the people of the State, and will go into effect as such, subject to the provisions of the Schedule annexed thereto, on the tenth day of July, nineteen hundred and two, at noon, and calling upon all the people of Virginia to render their true and loyal support to the same, as the organic law of the Commonwealth.

Sec. 25. This Constitution shall, except as is otherwise provided in the Schedule, go into effect on the tenth day of July, nineten hundred and two, at noon.

This Schedule shall take effect from its passage.

ON THE JURISDICTION.

THE COURT ERRED IN ALL ITS HOLDINGS.

The Federal Statutes under which these Proceedings are Instituted.

The statutes under which the complainants, in the one case, and petitioners in the other case, claim the right to proceed in the Federal Court for the redress of their grievances are

Revised Statutes of the United Title XXIV—Civil Rights.

> SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usuage of any State or Territory, *subjects, or causes to be subjected, any citizen* of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges or immunities secured by the constitution and laws*, shall be liable to the party injured in an *action at law suit in equity, or other proper proceeding for redress.*

And Section 629, of the Revised Statutes of the United States, Paragraphs Twelfth and Sixteenth, conferring jurisdiction upon the Circuit Court as follows:

> SEC. 629. The Circuit Courts shall have original jurisdiction as follows:
>
> * * * * * * * * * *
>
> Twelfth. Of all suits brought by any person * * * to enforce the rights of citizens of the United States to vote in the several States.
>
> * * * * * * * * * *

> Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom, or usage of any State, or any right, privilege or immunity secured by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

The right to proceed for the redress of their grievances, either by suit in equity, or by petition for a writ of prohibition, is conferred upon the complainants by the express language of Section 1979, of the Revised Statutes, if prohibition is a "proper proceeding for redress."

The forms of procedure in the equity cause are prescribed by the equity rules promolugated by the Supreme Court.

The forms and modes of procedure upon the petition for the writ of prohibition are conformable to the practice and pleadings existing in like causes in the Courts of record of the State of Virginia, as provided by the Revised Statues, as follows:

> SEC. 722. The jurisdiction in civil * * * matters conferred on the * * * * * * * * * Circuit Courts by the provisions of * * * * * Title "Civil Rights" * * * * * * for the protection of all persons in the United States in their Civil Rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but *in all cases where they are not adapted to the object, or*

are deficient in the provisions necesary to furnish suitable remedies * * * * * * *the common law, as modified and changed by the constitution and statutes of the State wherein the Court having jurisdiction of such civil* * * * *cause is held,* so far as the same is not inconsistent with the constitution and laws of the United States, *shall be extended to and govern the said Courts in the trial and disposition of the cause.*

CONCERNING THE NATURE OF THESE PARTICULAR SUITS.

These are not suits to test any claim of rival governments existing in Virginia.

But one government exists in Virginia. Every officer in the State, whose title or conduct is involved in this litigation, except the members of the Registration Boards, is a lawfully elected officer of the State under the constitution of Virginia, ratified by the people July 6, 1869, either for a term of office, not yet expired, or is continuing in office by virtue of an extension created by the alleged new constitution; or, if that extension be not lawfully enacted, he is holding on to his office until his successor shall be elected and qualified as provided by the old constitution.

The legal questions in the cases arise from the fact that a so-called convention sat in Virginia in 1901-2, and enacted certain ordinances, ordained a constitution and schedules, declared its work to be the organic law of the State as of July 10, 1902, and adjourned, claiming that its work was lawful; and the persons holding the executive, legislative and judicial

offices of the State accepted the same as lawful; have taken an oath to support the constitution, ordinances and schedules so ordained; have, in all respects, attorned to this alleged new organic law; and have attempted to impose upon the people of Virginia, the government ordained by said convention.

If the steps taken by the convention and the office-holders of Virginia to bring about this result, have been lawfully taken, and are constitutional, the complainants and petitioners have no case.

If, on the other hand, these steps were unlawful, the case is one of the most anomalous ever seen in the history of constitutional government. It is the organized, unanimous effort of lawfully elected officers of a State, to destroy the organic chart of government under which they were elected and to which they took an oath of allegiance; and, in violation of plighted faith, not only to transfer their own allegiance, but that of their constituents, to a new and entirely different chart of government, without giving those constituents any opportunity to approve or to reject their action.

There is no other legal phrase to describe such an attempt, except the term "conspiracy."

The conspirators are:

1st The members of the convention, who sought to pass the registration ordinance and ordain this constitution without authority.

2nd. Their appointees, who, as members of registration boards, have aided in carrying out their plans.

3rd. The Legislative, Executive and Judicial officers of the State of Virginia who have attorned to the supremacy of this spurious constitution, by taking oaths to support it under threat that their offices would be vacated if they did not.

A "conspiracy" consists of a combination of persons for the purpose of accomplishing an unlawful object, or to accomplish a lawful object by unlawful means.

The most succinct definition of "conspiracy" extant is perhaps that given by Judge Colt in Commonwealth v. Waterman, 122 Mass. 57, as "the combination of two or more to do something unlawful, either as a means or as the ultimate end."

Either of these definitions fits the conduct of those now in charge of the government of Virginia.

They have deliberately attempted, without original authority or subsequent sanction from the people of Virginia, to raise a strange flag upon the ship of State.

Selected and placed in charge of a craft which was flying the flag and manned and equipped by one government; they started upon a cruise and then without the sanction of masters or owners, raised a new ensign; returned to port with it nailed to the masthead; and threatened to bombard their own capital unless their masters took oaths of allegiance to their new *regime*.

There are ugly names for mariners like this upon the high seas.

HISTORICAL FACTS PERTAINING TO THE POWERS, DUTIES AND ACTIONS OF THE VIRGINIA STATE CONVENTION.

Virginia was one of the thirteen original States, which framed the constitution of the United States.

She was an independent sovereign State, beyond all question, after her independence was acknowledged by Great Britian.

But when she ratified the Federal Constitution she subscribed the Sixth Article of the Constitution, which declares:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be *the supreme Law of the Land*; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

When, therefore, we speak of the sovereignty of Virginia we speak, not of her independent sovereignty, as it existed when it was acknowledged by Great Britain, but of that sovereignty as qualified by her subsequent voluntary acknowledgement of the supreme sovereignty of the United States.

This qualified nature of her own sovereignty was pointed out to her at any early date by her immortal son John Marshall in the cases of *Marbury vs. Madison,* 1st Cranch, 137; and *Cohens vs. Virginia,* 6 Wheaton, 264, and no sane man, at all familiar with the history of the adoption of the Federal Constitution has questioned it since, so long as she is admitted to be a member of the Union.

For nearly a century the right of Virginia, as a sovereign State, to withdraw from the Federal Government was subject of doubtful and ofttimes angry debate.

In the year 1861, she proclaimed a dissolution of the bonds of Union and passed an ordinance of secession. She passed that ordinance of secession by delegates as solemnly summoned and by a convention as formally constituted, as any ever assembled, and the action of the convention was ratified by a large majority of her people.

The Federal Government denied her right to secede. It inaugurated a war against Virginia and her asso-

ciates. It declared that it prosecuted that war, not for conquest or subjugation, but for self-preservation, and to compel Virginia and her associate States to recognize the supreme, irrevocable authority of the Federal Constitution.

The people of Virginia, with practical unanimity, resisted the assault; levied an army, and waged a war of four years' duration against the supremacy of the Union.

Virginia, allied with other States, under the name of the Confederate States of America, resisted the authority of the United States for four years, during which period her government was in armed hostility to that of the United States, and, as time passed, and elections occurred, every officer of the Civil government of Virginia became one elected as an enemy of the United States, and upon entering into his office, took an oath to support the enemies of the United States.

Thus when the war ended the civil, as well as the military government of Virginia was an inimical government, installed while war with the United States was flagrant.

In April, 1865, the armies of the Confederate States were conquered by the armies of the Union, and dispersed to their homes.

The armies of the Union occupied the capital and all the territory of Virginia.

The civil government of Virginia fled.

From that time forth, until the year 1870, the only government existing in Virginia was a government of military occupation by the armies of the United States. Temporary, improvised, civil governments, such as Congress saw fit to provide from time to time, subordi-

nate to the military government, were the only semblance of civil government existing in Virginia.

The United States, having reduced the people of Virginia, by force of arms, to subjection to the authority of the United States, and to the acknowledgement of its supremacy, Congress, notwithstanding the tremendous force which the nation had employed to overwhelm the will of the people of the State upon the question of secession, proceeded thenceforth upon the theory that the States were not destroyed. It repeatedly declared that the States, so far as was consistent with the acts done to maintain the supremacy of the Union and to exact the allegiance of the people to the Union, as the supreme law, should be restored to their former condition as members of the Union.

Congress declared its recognition of the obligation and duty under the Fourth Section of the Fourth Article of the Constitution of the United States, to guarantee a Republican form of government to the States lately in arms against the government; and upon that theory it began a series of acts known as the Reconstruction Acts. The leading authorities upon this legislation are "Essays upon the Civil War and Reconstruction," by Professor Dunning, of Columbia University, New York; McPherson's History of Reconstruction; Lalor's Encyclopedia of Political Science, Vol. 3, p. 540 to 556; Blaine's Twenty Years of Congress; Jamieson on Constitutional Conventions and Von Holst.

Even before the termination of the war consideration of the status of the so-called rebellious States, when they should be subdued, arose and was discussed in Congress.

The first reconstruction measure was enacted by the

House of Representatives, May 4, 1864. It authorized the appointment of provisional governors for the rebel States, when they should be conquered; the enrollment of all *white* male citizens; the right to such as took the oath to elect delegates to conventions to restablish the State governments; required those conventions to adopt constitutions disqualifying all civil or military officers in the rebellious power; prohibited involuntary servitude; and demanded repudiation of confederate debts; it provided for the certification of such constitutions by the provisional governors to the President, and authorized the election of Senators, Representatives and Electors when the President, after obtaining the consent of Congress, should proclaim such governments.

Mr. Lincoln failed to sign the bill, because it was received less than an hour before final adjournment, but in his proclamation of July 8, 1864, he indicated his general approval of the plan (13 Stat. at Large, p. 744).

It will thus be seen that at the very outset of legislation on this subject the plans for restoring the insurgent States to their places in the Union, embraced the imposition of conditions and the withholding of such restoration until those conditions had been accepted by the States. And no other plan ever proposed in the Federal Congress omitted these conditions as one of the indispensable prerequisites of recognition.

Without going into the details of all the reconstruction measures, suffice it to say that by joint resolution of Congress (13 Stat. at Large, pp. 567-568), the insurgent States were declared not entitled to representation in the electoral college for the term of office commencing March 4, 1865. (See McPherson's Political History of the Rebellion, Appendix, pp. 577-579).

Electoral votes offered by Louisiana and Tennessee predicated on the election of 1864, were rejected under this law.

Congress proceeded consistently upon the theory that the States must be "reconstructed," before they could be restored to their rights in the electoral college.

The reasons for this demand by the Federal Government were as follows:

(1) Unless the reorganized governments of the States, lately insurgent, abandoned forever the doctrine of secession, the war had been fought in vain.

(2) As a war measure, the slaves of the Southern States had been emancipated, and not only was the triumphant North resolved that the conquered South should recognize this emancipation, but it was further firmly convinced that, to make that emancipation effectual, the late slaves should be endowed with citizenship and franchise in order to protect themselves.

The Southern States, to a certain extent, unwisely provoked such legislation by sundry statutes which they passed. (See Dunnings Essays, p. 74 to 92; Blaine's Twenty Years of Congress, p. 93 to 107).

(3) The North was resolved that the Southern States should repudiate all Confederate debts.

The debates in the 39th and 40th Congress, extending from 1865 to 1868, give in full the Northern view of the essential requisites of the reconstruction acts. Shellabarger, Stevens, Morton, Sumner and Fessenden were among the leading orators and framers of the legislation; and the keynote of all the debates and laws formulated was that the United States was bound by the Constitution to guarantee to each State a Republican form of government; that the "guarantee" was collateral to the primary obligation of the State to provide such govern-

ments for themselves, and that if the States failed to provide and to maintain them, then the United States, as the guarantor, must provide and maintain them, and might, if it deemed it necessary, bestow the right of suffrage upon such persons as it saw fit.

Tennessee was the first State restored to her representation in Congress by a general resolution passed July 24, 1866, she having adopted a satisfactory constitution. This was doubtless largely through the influence of her citizen Andrew Johnson, then President of the United States. (14 Stat. at L. 364.)

The first general act providing for the government of the rebel States was passed March 2, 1867. (14 Stat. at L. 428.) It declared that no legal State government existed in certain enumerated insurgent States including Virginia. It divided the States into military districts, to be ruled and commanded by army officers.—Virginia was designated as District No. I. By the Fifth Section of the law, it declared that when the people of any one of the States named should present a constitution,

> "Framed by a convention of delegates, elected by the *male citizens* of said State, twenty-one years, and upward, *of whatever race, color or previous condition,* who have been residents of said State for one year previous to the date of election, with certain exceptions, *and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated* for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of the ratification * * * and when such constitution shall have been submitted to Congress for ex-

amination and approval, and Congress shall have approved the same, and when said State, by a vote of its Legislature, elected under the said constitution, shall have adopted the amendment to the constitution of the United States proposed by the 39th Congress and known as Article XIV * * * said State shall be declared to have a representation in Congress, and Senators and Representatives shall be admitted therefrom on their taking the oath prescribed by law."

Thus we see that the right of the people of Virginia, even to hold a convention and frame a constitution after her conquest by the Federal Government, was based at the very outset, upon the condition that the delegates should be elected by male citizens of the State twenty-one years and upwards. of whatever race, color or previous condition, and upon the further express condition that the constitution should provide an elective franchise to be enjoyed by all such persons.

A supplementary act passed in March, 1867,, (15 Stat. at L. p. 2) provided for the registration of qualified voters under the supervision of the commanding general, and for the holding of elections by such registered voters, etc., and Congress expressly reserved power to pass upon and approve the Constitution adopted before it should become operative. All registered and qualified electors had opportunity to vote freely and without restraint.

Other amendments of the law were passed July 19, 1867, (15 Stat. at L. p. 14). They related to the true intent of the act; the powers of military commanders, and provisions for registration.

June 22, 1868. Arkansas was declared entitled to

admission, but upon the "fundamental condition" that her constitution should never be changed so as to deprive any citizen, or class of citizens of the United States, of the right to vote, who were entitled to vote by the constitution then recognized. (15 Stat. at L. p. 72).

June 25, 1868, North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida were admitted to representation upon the same "fundamental condition;" and not until April 10, 1869, did Congress authorize the submission of the constitutions of Virginia, Mississippi and Texas to the vote of the people. (16 Stat. at L. p. 40.)

How Virginia was Re-Admitted.

When the bill allowing the people of Virginia to vote upon the proposed constitution came up in the Senate, after having passed the House, it was debated April 9th, 1869. (See Congressional Globe & Appendix, 1st Session, 41st Congress, p. 653.)

To the bill as it had passed the House, Senator Morton offered an additional section requiring the Legislature of the State to ratify Amendment XV to the Constitution before she should be admitted. To that Senator Trumbull objected. In the course of the debate Senator Morton said:

> "We have already required these States, as a condition that they shall put universal suffrage in their State Constitutions; and if they propose to accept that in good faith in their State Constitutions, what objection can they have to putting it into the Constitution of the United States? None whatever. If they shall object to putting it into the Constitution of the

United States, it will be because they do not accept it in good faith in their State Constitutions and are relying upon re-modeling their State Constitutions and the depriving the colored man of the right of suffrage."

Much more to the same effect was said in the debate and the section was added requiring the legislatures of the States to ratify the XVth Amendment.

The act was passed April 10th, 1869.

(Cong. Globe, 41 Cong., 1st Session, Appendix 49.)

The provisions were as follows: Section 1, authorized the President, at such time as he might deem best, to submit the constitution which was framed by the convention which met in Richmond, Virginia, December 3, 1867, to voters of the State, and permitted the President to submit to a separate vote such provisions as he might deem best.

Section 2, permitted the voters at the same election to vote for and elect members of the General Assembly, and all officers and members of Congress. The election was to be held and returns made under the act of Congress.

Sections 3 and 4, related to Texas and Mississippi.

Section 5, provided that, if the constitution was ratified, the legislature should assemble at the Capitol on the fourth Tuesday after promulgation of the ratification by the military officer commanding the State.

Section 6, provided that before Virginia should be admitted to representation in Congress, the legislature should ratify the XVth Amendment.

Section 7, provided that the proceedings were not to be deemed final until the action of the State authorities was approved by Congress.

Under the act of April 10, 1869, the constitution of

Virginia, was voted on for ratification or rejection, July 6, 1869. The popular vote was 210,000. It was nearly or quite as large as the vote cast in the gubernatorial election of 1881, between Cameron and Daniel, twelve years later. Of the popular vote cast 201,000 voted in favor of the constitution, and it was ratified in a campaign of great enthusiasm. Gilbert C. Walker was elected governor, and the legislature was likewise elected.

In the month of October, 1869, the legislature met, ratified the XV Amendment, and the XIV Amendment, and adjourned October 26th, to meet again on the second Tuesday after Congress should approve the action of the people of Virginia in the late election. (Acts 1869-70, p. 1-3.)

Hon. Zeph. Turner was elected speaker of the House.

The commanding general certified the constitution, as adopted, to the President who informed the Congress of the United States of the result.

The question of the readmission of Virginia led to a long and spirited debate in Congress. The constitution of Virginia itself provided, Article XII, Sec. 2, on the subject of amendments:

> "That no amendment or revision shall be made which shall deny or in any way impair the right of suffrage or any civil or political right as confered by this constitution except for causes which apply to all persons and classes without distinction."

The act to admit Virginia to representation was reported without condition, but was opposed in the Senate by Senator Thayer of Nebraska. (Congress. Globe, Part 7, Appendix, 2nd Ses., 41st Congress, pp. 69-71.)

In the course of his remarks Senator Thayer pointed out that when the States of North Carolina, South Carolina, Georgia, Louisiana, Alabama, Arkansas and Florida were admitted under the act of June 25, 1868, they had been admitted upon the fundamental condition that their constitutions should never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said States, who were entitled to vote by the constitutions then recognized, and he asked the question:

> "Why, I ask the Senator from Nevada, and those who are acting with him, do you refuse now, two years later, to apply the same condition and require the same pledge from the State of Virginia? What has she done to entitle her to this immunity? What will be the inferences to be drawn by Virginia on the refusal of Congress to require this same pledge? It must inevitably be that she may do with impunity that which you required Georgia to pledge herself she would not do; because you do not require the same pledge from Virginia; and judging by the past we have abundant reason for believing that she will make use of the privilege that we thus give her."

Further urging the conditions, he said (p. 71):

> "We have solemnly promised to the faithful people of Virginia that they shall have the equal protection of the law and the blessings of good government. I appeal to every Republican Senator in this presence today, if he is sure he is making that pledge good to that oppressed people? No, sir. The declarations of too many of those who avow themselves in favor of the passage of the bill show what

> universal distrust there is in regard to this legislation; and yet we are urged to put it right through without let or hindrance * * * That government which cannot protect the rights of its citizens is a mockery. If the State fails to do this, then the United States must enable her to do it, if the failure results from want of power, or compel her, if it is a voluntary failure * * * Under this constitutional trust the obligation rests upon Congress to make sure that such a government is established in Virginia."

January 11, 1870, Mr. Farnsworth, of Illinois, (Congressional Globe, 2nd Ses., 42st Congress, p. 362) reported in House of Representatives a bill to admit the State with fundamental conditions attached. The fundamental condition which gives rise to this litigation is as follows:

> "THAT THE CONSTITUTION OF VIRGINIA SHALL NEVER BE AMENDED OR CHANGED SO AS TO DEPRIVE ANY CITIZEN OR CLASS OF CITIZENS OF THE UNITED STATES OF THE RIGHT TO VOTE, WHO ARE NOW ENTITLED TO VOTE BY THE CONSTITUTION HEREIN RECOGNIZED, EXCEPT AS A PUNISHMENT FOR SUCH CRIMES AS ARE NOW FELONIES AT COMMON LAW."

Subject to said condition, which she expressly accepted; under which she has acted for over thirty years; and which she is now estopped from denying or questioning, the State of Virginia was permitted to resume her relations to the United States and to exercise all her ancient sovereign rights, save as they were curtailed, surrendered and limited by her assent to the fundamental conditions aforesaid.

The act of Congress embodying that condition was passed January 26, 1870, (16 U. S. Stat. at Large, p. 62).

In the course of the debate upon the bill reported by Mr. Farnsworth, Mr. Bingham, of Ohio, moved to strike out the conditions. Mr. Farnsworth (Ibid. p. 400) stated that the constitution was adopted by a vote of 201,441 votes in its favor and but 9,136 votes against it. The proposition to strike out the condition was opposed by a number of Congressmen, among whom was Mr. Payne (see p. 402), who pointed out that there was nothing extraordinary in these conditions, and at page 406 will be found a summary as follows:

> Ohio, by the ordinance of 1787, came in under fundamental conditions against framing any constitution repugnant to ordinances of 1787, and upon a further condition against holding slaves, imposed by Virginia in her cession of her rights to the Northwest Territory; and Virginia voted for that (1st Stat. at Large, p. 174).
>
> Missouri came in, in 1821, under a "fundamental condition" that a section of her constitution should be construed in a particular way. Virginia voted for that. (3rd Stat. at Large, p. 645.)

And fundamental conditions were annexed to the admission of the State of Nebraska.

In the course of the debate Mr. Bolles, of Arkansas, in the House (Ibid. p. 61), said:

> "Considering that Virginia has technically complied with the Reconstruction Acts, there is nothing for us to do now but to admit her with the fundamental conditions attached to

> this bill * * * * * I here and now say to Virginia * * * * to beware upon what she enters, for unless she administers her laws in a more equal and exact justice than I believe she will, I will vote to place her again under the control of the military, as we have Georgia and will Tennessee. This I apprehend will become our duty within less than three years; for I am quite certain the occasion will arise for Federal intervention for the protection of our citizens there."

In the course of the debate Gen. John A. Logan interrupted Mr. Farnsworth (Ibid. p. 401) and asked how he would enforce any penalty on the State, or what the penalty would be and what the people of Virginia would forfeit if they changed the constitution in violation of the bill?

Replying to General Logan, Mr. Lawrence (Ibid. 433), said:

> "If the State of Virginia should change her constitution so as to disfranchise a majority of the men now entitled to vote in that State, she would cease to have a Republican form of government, and under the powers which Congress has to guarantee to every State a Republican form of government, we could reconstruct her by the grace of God, and the power of the constitution."

And then, proceeding to a more definite answer, he said:

> "If the State should undertake to deny to citizens the right to vote secured by this fundadamental condition, every citizen so denied would have his civil action for redress in the Court against every officer denying the right.

That would be a penalty and a mode of enforcing it."

Again at page 433 he said:

> *"The fundamental condition fixes the rights of citizens, and the Courts will furnish redress for their violation. If further legislation in aid of the remedy shall be necessary it can be had. The National Courts are, or may be, clothed with requisite power to enforce this fundamental law.* I do not say that this bill furnishes all the penalties, or the means of enforcing its fundamental conditions, as fully as it should."

Then after suggesting what he would have added, he proceeded:

> "That would be a penalty and a mode of enforcing it. But without that, if Virginia should change her constitution so as to deny to the citizens the rights secured by the 'fundamental condition' her constitution in that respect would itself be unconstitutional, or at least void, and the National Courts would so declare. The constitution of a State may itself be unconstitutional or void because in contravention of a provision of the national constitution or of an authorized act of Congress obligatory on the State.'

Replying to the motion of Mr. Morgan, of Ohio, to strike out the fundamental conditions, Mr. Lawrence further said:

> "My colleague (Mr. Morgan) insists that Virginia is and always has been a State of the Union entitled to representation in Congress; and his political friends would admit her to representation without any terms or conditions.

> without 'indemnity for the past or security for the future,' giving the late rebels, without penitence or repentance, with Lee and Wise at their head, conquered but not subdued, complete political control of her fortunes and the loyal men, black and white, delivered over to the mercies of men who recently enslaved them all and made a war of rebellion to render their bondage eternal." *

The record shows, moreover, that the constitution, ratified by the people of Virginia, July 6, 1869, was not imposed upon the state by coercion as is so often asserted now. The popular vote was 201,441 in favor and 9,136 against it (Ibid. p. 400).

A committee of the legislature of Virginia, headed by Hon. Zeph. Turner, speaker of the house of delegates, appeared before the Reconstruction Committee and pledged Virginia "to keep faith and to carry out every provision," and this pledge was in writing and in print in a document which Mr. Farnsworth, the patron of the bill admitting Virginia, presented to the House (Ibid. p. 402).

The anxiety of the Virginians to be re-admitted was referred to by Mr. Whittimore (Ibid. p. 437) who described them as "eager anticipants of power who had plied their persuasive arguments and organized endeavor to convince our ears and control our acts."

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* Apropos of this allusion to the Lees and Wises, it accepted as a compliment, because it shows who were the men that had maintained the courage of their convictions on the opposing side and that they had made their foes know them. While using personal names, the language was directed to a class, composed of men who, having done their best, after staking all and losing all, were not rushing forward to kiss the hand that smote them, or offering to give pledges which they did not understand or did not intend to keep. They were men who knew the solemnity of a pledge and what the giving of it imported.

It may also be noted that they were absent or in opposition, when it was sought to violate the plighted faith of the State as conspicuously as when they were no parties to the giving of the obnoxious pledges

And finally Mr. Farnsworth, the patron of the bill (Ibid. p. 500) said:

> "Allow me to say that the opposition to the conditions contained in this bill does not come from the people of Virginia. Neither Governor Walker, nor any of the administration, if I may be allowed the expression, elected on the ticket with Governor Walker, that I am aware of, have protested against these conditions * * * * *Neither do they object to the other conditions with reference to the change of their constitution, for they have provided in that same constitution thus ratified by so large a majority amounting almost to unanimity, nearly the same thing contained in the bill.*

The provision of the constitution of Virginia referred to by Mr. Lawrence was Article XII, Sec. 2, on the subject of amendments:

> "That no amendment or revision shall be made which shall deny or in any way impair the right of suffrage or any civil or political right as conferred by this constitution except for causes which apply to all persons and classes without distinction."

So eager were the Virginians to regain control of the State that they did not hesitate to enlist in their behalf Gen. Henry H. Wells, the defeated candidate of what was known as the radical wing of the Republican party in the State of Virginia at that time. For, be it remembered, that the successful party, headed by Gilbert C. Walker, adopted, in that campaign, the name of "True Republican party;" and it is also a matter of congressional record that Raliegh T. Daniel, the chairman of this "True Republican Party," telegraphed to President Grant immediately after the elec-

tion of July 6, 1869, "Congratulate you upon the success of *your* policy in Virginia."

Virginia, upon these solemn pledges, given in her constitution itself, and upon the conditions solemnly annexed to the act readmitting her, and upon this hungry chorus of asseverations of her good faith, resumed her relations to the Union and her Senators and Representatives took their places in the Congress of the United States.

Concerning the origin and derivation of the right of suffrage in Virginia, see:

91 Virginia 322, Pierson vs. Supervisors.

Wiley vs. Sinkler, 179 U. S. 58.

The right to vote for members of Congress is not derived merely from the Constitution of the State, but from the Constitution of the U. S.

Swafford vs. Templeton, (May 19, 1902,) 185 U. S. p. 487.

The pledge given by Lawrence that further legislation, in aid of the remedy for the invasion of civil rights would be enacted, was redeemed by Congress, for in the following year the section, which is now Section 1979 of Title XXIV, Civil Rights Bill, was enacted April 20, 1871. (See Stat. at L. Vol. 17, p. 13, Chap. 22, Sec. 1).

The act conferring jurisdiction upon the Circuit Courts to enforce the rights of citizens of the United States to vote in the several States was passed May 31, 1870 (16 St. at L. p. 140, Chap. 114), and by the same act jurisdiction was conferred upon the Circuit Courts, of all suits brought to redress the deprivation under color, of any law, statute etc., of any right, privilege or immunity by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States,

By that same act also, Section 18, the pledge of Congress to furnish ample remedy was redeemed when it declared that, in all cases arising under the Civil Rights Bill, the Circuit Courts, when the laws of the United States were deficient in provisions necessary to furnish suitable remedies, should adapt their proceedings to the common law as applied in the States, and should give substantial relief, comformable to those remedies.

It has been necessary to set forth the above legislation in the order of its enactment:

(1) To show what the rights of complainants are;

(2) That they are Federal rights;

(3) That the Federal law-makers intended to protect them;

(4) That they exacted pledges from the States to respect them;

(5) That they did not trust to the pledges of the States alone;

(6) That they intended to commit the protection of these rights to Federal courts;

(7) That they pledged themselves to create in Federal Courts a jurisdiction to entertain suits for the protection of these rights;

(8) That they redeemed that pledge by conferring express jurisdiction in these cases upon the Circuit Courts;

(9) *That they conferred the jurisdiction unlimited by precedents of practice, and purposely enlarged it so as to enable the Circuit Court to adapt their procedures to State procedure lest they might find some technical difficulty in the way of their enforcement of these rights; and*

(10) Because the decision of the court below, as is respectfully urged, "sticks in the bark" of *nisi prius*

precedents in cases not arising under the Civil Rights Bill; ignores the enlarged jurisdiction, which the courts are solemnly called on to exercise, and thwarts the purpose of Congress, by disclaiming, evading and ignoring a jurisdiction, which the Federal Circuit courts were directed to exercise.

The Circuit Court had jurisdiction of both cases and should have exercised it.

First. It had jurisdiction of the subject—the State was not a necessary party—and the political nature of the controversy did not defeat the jurisdiction.

Second. It had jurisdiction of a bill in equity and should have granted an injunction.

Third. It had jurisdiction to grant and apply the particular remedy of a writ of prohibition.

We will argue these propositions in the order stated

FIRST. It had general jurisdiction—the State was not a necessary party—and the political character of the controversy did not defeat the jurisdiction.

The cases presented in the court below bear no resemblance whatever to cases of the class of *Luther v. Borden*, 7 Howard, 1, and *Taylor & Marshall v. Beckam*, 178 U. S., 578.

In those cases rival State governments existed, and the Federal Courts were called upon to decide between the claims of two existing State governments.

In the first case, the political powers of the Federal government had recognized one of the existing governments of Rhode Island, and the Supreme Court held that, it being a political question, Federal Courts would follow the decision of a co-ordinate branch of the Federal government upon the political aspects of the case.

In the case of Taylor & Marshall v. Beckham, which is about the last case of this character decided,

the Supreme Court in substance held that upon a like question arising in the courts of the State it would be guided by the decision of the court of last resort of the State, on matters pertaining altogether to the construction of the state laws, involving the question which of two existing governments in the state, was lawful.

These rulings are the substance of the long series of cases involving the same question, decided between 1848 and the present time by the Supreme Court.

But the cases at bar present no such issues as these.

There is but *one* government in Virginia.

There is no rival government.

The sole and only question is whether the only set of officers in the State—officers confessedly lawfully elected and qualified—*are acting under the law or outside of the law.* Whether lawfuly elected officers of the State are proceeding under invalid and unconstitutional laws. Whether they are not, in fact, violating the constitution and statutes of their own State and the United States which they are sworn to support, and under color of invalid and unconstitutional constitutions, schedules and ordinances, depriving plaintiffs of rights, privileges and immunities guaranteed to them by the constitution and laws of the United States, and State of Virginia.

The State has instituted no inquiry on this question, and is party to no proceedings whereby her presence in these causes is necessary.

They are not suits brought to review anything to which she has ever been a party. They relate to no cause pending in any of her tribunals, to which she is either directly or constructively a party. They do not seek to compel her to do anything. In order to do justice it is not necessary to enter any affirmative order against the State.

The state is not a *dual entity;* she exists by virtue of one Constitution and one set of laws enacted pursuant thereto.

If the federal courts have not power, in enforcing an admitted right of suitors, against officers violating that right, to determine what is the constitution and what are the lawfully enacted stateutes of the State; and if they have not, having so decided, power to compel State officers to conform to the valid and subsisting laws, State and Federal; then the power ostensibly conferred upon the federal courts is worse than nothing, it is folly.

If this is the whole scope of federal judicial power the federal judiciary can in no case restrain officers of a State from setting at naught the constitution and laws of the State or the United States; for the defense made in this case would be good in every case, to-wit, that the officers whom it is sought to restrain are acting under color of a State constitution and State laws; that in doing so, they represent the State; that the State is thereby a necessary party to the enquiry, wherefore the federal courts have no jurisdiction of the subject.

This is certainly a new and restricted view of the power of the federal judiciary.

It involves this inevitable result.

Officers of a State may pervert and misconstrue the laws of a State, and administer laws, invalid *per se* and violative of the federal constitution and laws and federal rights of citizens.

Federal statutes may grant redress in federal courts to citizens thus affected.

Citizens, by virtue of those statutes, may sue in Federal Courts to restrain such state officers from plain violations of law.

But such officers may appear, suggest that they are

violating the law in their official character as representatives of the State; and thereupon the federal court must stop; must hold that a judgment against them for the perversion of laws, State and Federal, is in effect a judgment against the State administering her laws; and that as the State is not a party and cannot be made a party, federal judicial authority is powerless although it may plainly see that the law is not a valid law of the State, or is one which if it be a law of the State, is not such as the State had a right to pass.

If this be indeed the limit of federal judicial power, then this court has been very late in finding it out. Under this Constitution even courts of the State of Virginia have greater power to enforce federal laws than have the federal tribunals themselves.

There can be no doubt of the jurisdiction of Circuit Courts to entertain this class of cases.

As late as the year 1900 the Circuit Court said: "The right to vote for members of Congress is not derived merely from the constitution and laws of the State in which they are chosen, but has its foundation in the constitution and laws of the United States."

Wiley v. Sinkler, 179 U. S. 58.

In 1901 this Court again said:

"A case arises under the constitution of the United States, when the right of either party depends upon the validity of an act of Congress."

Patton v. Brady & Co., 184 U. S., 608.

And in a case decided in the present year the jurisdiction of the court has been sustained in a case of this class.

Swafford v. Templeton, 185 U. S., p. 487.

If the contention that the state is a necessary party and that the nature of the controversy is political, be good in these cases why was it not good in the cases of

Wiley v. Sinkler and Swafford v. Templeton above cited?

The form of the action does not change the nature of the controversy.

The actions in those cases were against election offictrs of a State for refusing the plaintiff's vote.

The election officers defendant under the State law and pleaded that in their action they were merely representatives of the State.

The State was as much a necessary party to those cases as to these, and the questions were as much political questions in those cases as are the questions in these cases.

This court has sustained the jurisdiction *in equity* to restrain state officers from violating the law in many cases, independent of the special jurisdiction conferred upon federal courts in suits in equity brought under the Civil Rights Statutes.

In 1872 in the case of Kellogg v. Warmouth, 14 Fed. Cases, 7667 the Circuit Court of Louisiana entertained a bill of this character in a case singularly resembling this in its facts, and restrained the governor of Louisiana from using false registration lists.

The Supreme Court of the United States refused to interfere by a writ of prohibition to prevent the exercise of that jurisdiction.

See ex parte Warmouth, 17 Wall. 64

In Davis v. Gray, 16 Wall, 203, Governor Davis of Texas was enjoined from wrongfully issuing patents to lands.

In Board v. McComb, 92 U. S. 531, the Governor of Louisiana was restrained from issuing bonds under an unconstitutional act, and the Court, replying to the contention that the State should be a party said:

"In either case, if the officer plead the au-

> thority of an unconstitutional law for the non-performance or violation of his duty it will not prevent the issuing of the writ. An unconstitutional law will be treated by the course as null and void."

And again it said:

> "When plain official duty * * * * is to be performed * * * * and when such duty is threatened to be violated by some positive official act, any person who may sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it."

In Ralston v. Missouri Fund Commrs., 120 U. S., 391, the Governor of Missouri and others were enjoined from selling certain property.

In Mutual Life Ins. Co. v. Boyle, 82 Fed. Cases, 705. the court used very strong language concerning the power of the federal courts to restrain state officers, acting under color of state statutes or state authority, from doing acts instigated by malicious, wicked, arbitrary and capricious designs to oppress the plaintiffs and deprive them of their rights.

The Supreme Court of Virginia has likewise declared:

> "Chancery has jurisdiction to enjoin illegal acts of an officer attempted *colore officii*. A suit against an officer is not necessarily a suit against the State, e. g.—a suit to restrain one from doing unlawful acts under color of an executive office, such as illegal acts of the Commissioner of Agriculture."
>
> Blanton, Comr. v. So. Fert. Co. (1883) 77 Va., 335.

The defendants, in the court below (cited), in sup-

port of their contention that these proceedings were suits against Virginia contrary to the XIth amendment of the Constitution of the United States and that Virginia was a necessary party, the following cases:

Louisiana v. Jumel. 107 U.S., 711.

Hagood v. Southern, 117 U. S., 52.

Cunningham v. R. R., 109 U. S., 446.

Ex parte Ayers, 123 U. S., 443.

McCawley v. Kellogg, 2 Woods Cir. Ct., Reps., 13.

Collector v. Day, 11 Wall., 113.

Not one of these cases in any way weakens the contentions of this argument.

In the Jumel case the plaintiff sought "to compel by judicial process the officers of the State to enforce the provisions of the act" (it was a law imposing an annual tax).

The effort was to *affirmatively invoke and employ the machinery of the State to enforce a law to collect money,* and it was impossible to do this without affirmative mandates upon the State.

In the present cases, the whole object is to restrain proceedings of officers under a void law. Even in the Jumel case there was a strong dissent by Field and Harlan.

In Haygood v. Southern, 109 U.S., 53 (1885) the suit was brought *to enforce the performance of a contract made by the State* by mandates upon the officers of the State. The decision points out the distinction between cases in which the relief sought is the performance of a plain official duty, and cases like that in which *the relief sought was affirmative official action by State officers to compel them to carry out a contract of the State.*

The case of Cunningham v. R. R., 109 U. S., 446

(1883) is strongly in our favor. Mr. Justice Miller enumerated the cases in which the federal judicial power may be invoked. His second and third enumerations plainly include cases like these.

"2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. *In these cases he is not sued as, or because he is, an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer.*

To make out his defence he must show that his authority was sufficient in law to protect him." (p. 452.)

"3. A third class * * * * is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process * * * *. It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the defendants, a Court of Chancery may, by a mandatory decree, or by injunction * * * * enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's rights."

The opinion approves the cases we have cited and it is respectfully insisted that these cases fall within the second and third enumerations made by Justice Miller.

They are cases in which officers assert authority and must make out their defense, by showing that their authority was sufficient in law to justify their action and protect them. They are cases in which officers of the government have a well defined duty, in regard to

a specific matter, in which voters having a distinct interest capable of enforcement by judicial process are injuriously affected by their perversion of their duties, and the application is to enforce the rights of voters by an injunction forbidding the officers from acting under void laws.

The distinction is clearly drawn by Mr. Justice Miller in the Cunningham case, between suits of that character seeking affirmative relief, and those in which the relief sought is the forbidding of State officers from acting unlawfully.

In the case of *In re* Ayers, 123 U. S., 443, it is expressly said:

> *"But it is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespass and wrongs, nor to prohibit suits* against officers in their official capacity and either to resist or direct their official action by injunction or mandamus."

And the Court cited approvingly the case of the Board of Liquidation v. McComb, 92 U. S., 531, and referred to Seibert v. Lewis, 122 U. S., 284, as an instance in which such relief would be granted.

The same authorities are cited approvingly in the case of Minnesota v. Hitchcock, 185 U. S., 388.

The case of McCawley v. Kellogg, 2 woods Cir. Ct. Reps. 13, was a plain attempt to obtain affirmative relief against the State upon a contract of the State, by compelling officers to do what the State had neglected to do, and is in no respect parallel with these cases.

The case of Collector v. Day, 11 Wall. 113, must have been cited by mistake, for it has nothing to do with this subject.

The authorities cited by the defendants in the Court below on the proposition that the bill seeks to have the Court interfere with the respondents in the performance of purely governmental functions and political duties are equally at fault.

The opinions of Fuller, C. J. and Hughes, J., in the case of Green v. Mills, 69 Fed. Rep., 852, do not support the defendant's contention. They carefully note the fact that the bill in that case did not charge or point out as deducible from the facts stated any discrimination on account of race, color or previous condition of servitude. This is the language:

> "No discrimination on account of race, color or previous condition of servitude is charged or pointed out as deducible on the face of the acts in question."

This was plainly the chief support of the decision. The decision also dwelt upon the fact that the suit was not for the infringement of any civil rights. These suits do charge discrimination against the plaintiffs and petitioners on account of race, color or previous condition of servitude. They do aver the invasion of the civil rights of plaintiffs and petitioners as the ground for invoking equitable interposition; *and they point to the statute applicable to this very class of cases, giving them the right to seek redress by bill in equity or other appropriate remedy as the basis of their claim of jurisdiction.*

The cases of Mississippi v. Johnson, 4 Wall., 475; Georgia v. Stanton, 6 Wall., 50, and Luther v. Borden, 7 How., 1, and indeed all the other cases cited by defendants below fall within the principle above discussed concerning the going counter by one department of the government to rulings of another department of the same government on political questions; and the

State cases cited by defendants below, from West Virginia, Illinois, Maryland, Minnesota and North Carolina merely announce the principle that under the old State chancery practice, independent of statutes creating jurisdiction, there was no power of chancery to interfer for the protection of rights of this character.

Much was said in the argument below by the learned Chief Justice about the invasion of the legislative and executive department by the judiciary, and the argument seemed to have weight in the mind of the learned Chief Justices; but it is respectfully submitted that in the cases at bar the point should have no weight whatever.

The judiciary of the United States is not in any sense a co-ordinate department of government with the legislative, executive or judicial departments of any of the States.

It is a co-ordinate department of the Federal Government. In cases in which it may be called upon to restrain or control the conduct of either the Legislative or Executive Department of its own Government upon the construction or administration of the laws, the argument might be pertinent that it was invading the sphere of one of its own co-ordinate departments.

But Federal power is not vested for administration, in any department of State Government as a co-ordinate of the Federal Government. On the contrary, the administration and the enforcement of Federal laws is committed solely to the several departments of the Federal Government, with both the power and the duty to enforce those laws against everybody, including every department of the State governments. To this extent, at least, the State governments, in every

one of their departments, are subordinate to every department of the Federal Government.

There are undoubtedly many cases in which the judiciary department of a State government might properly hesitate to attempt to control or direct one of its co-ordinate departments in the State government, because of the distinct spheres of the several co-ordinates in the system of the State and their relations to each other as parts of a homogeneous whole.

But this reasoning is not applicable to a Federal Court. It is no part of the State government. Whatever it may do touching any department of a State government, it does not invade a co-ordinate sphere. It moves in a different and independent sphere from those of the State governments. Its duties are imposed by its own distinct government; and, in enforcing those duties, it matters not what department of the State government it operates upon, it is as much bound to restrain the executive or legislative department of a State government as any other department or instrumentality of the State government. It possesses no more power to invade the judiciary department of a State government than to invade any other department thereof. If Federal rights are entrusted to it for protection it has as much power to invade one department as another of a State government in the enforcement of Federal law.

This distinction has been thoroughly recognized by the State Court themselves.

In the case of Bates v. Taylor, 3 Pickle (Tenn.), 319, decided in 1899, in which the State Court refused to grant the writ against the executive department of the State government, the Court refused to be guided in its action by sundry Federal decisions cited by counsel in which governors of the State had been re-

strained. It declined to be guided by the Federal decisions for the following reason:

> "The most that can be said of these cases is that they show the jurisdiction of the Federal Courts to restrain the governor of a State from doing a wrongful act to the injury of individual rights * * * * *There is a wide difference between the relation of the Federal Judiciary and the State Judiciary to the governor of the State.*" *(Italic ours.)*

And then the opinion proceeds to point out the difference above contended for, which is too plain to need further elaboration.

In the light of the above authorities and of the plain purpose of Congress to place civil rights under the protection of the Federal Courts; in the light of the special jurisdiction conferred, by the acts above quoted, upon the Circuit Court; in the light of the broad grant of remedy by action at law, *suit in equity,* or *other appropriate remedy,* given to the people who might be wronged; it is respectfully submitted that the Circuit Court had jurisdiction to entertain the bill in equity, and ought to have passed upon the legality and the constitutionality of the laws and ought to have granted the relief prayed for.

This Court, in the case of Railroad Co. v. Brown, 17 Wallace, 445, did not hesitate to enforce the acts of Congress touching civil rights against a petty corporation.

Speaking of the grant on conditions not to discriminate against blacks it said:

"Congress in the belief that this discrimination was "unjust, acted. It told this company in substance that "it could extend its road within the district as described, "but that this discrimination must cease and the colored

"and white race, in the use of cars, be placed on an "equality."

"*This condition it had the right to impose* and in "the temper of Congress at the time it is manifest "the grant could not have ben made without it. It "was the privilege of the company to reject it, but to "do this it must reject the whole legislation with which "it was connected. It cannot accept a part and repu- "diate the rest. Having, therefore, constructed its "road, as it was authorized to do, and in this way "greatly added to the value of its property, it will be "held to a faithful compliance with all the terms "accompanying the grant by which it was enabled to "secure this pecuniary advantage."

Was Congress in a different temper when it imposed the fundamental conditions upon Virginia?

This Court has said that it had the right to impose these conditions.

White v. Hart, 13 Wall. 646.

Did not Virginia accept the conditions as solemnly as did the railroad in Railroad v. Brown?

Can she accept a part of the act restoring her and repudiate the rest?

Having accepted it and greatly added to her political liberties as they existed then, will she or not be held to a faithful compliance with all the terms accompanying the grant by which she was enabled to secure so great an advantage?

Is it not more than a question of her redeeming her plighted faith?

Does it not involve the liberty of the people for whom Congress assumed the guardianship and to whose protection the Federal power, legislative, executive and judicial has been solemnly pledged?

To seek to avoid a jurisdiction thus conferred would

be to the unspeakable shame of that department of the Federal Government which is the glory of its citizens, and, until now, has proved itself the palladium of their libertites.

By the acts cited Congress deliberately broadened the jurisdiction of the Federal Courts in order to enable them to reach the evil it intended to eradicate. We must not construe the power of Courts, or their modes of procedure ignoring these acts which were intended to make the jurisdiction broader and deeper and wider make the jurisdiction broader and deeper and wider than it had theretofore been.

As was said by Judge Bradley in Pennsylvania Co. v. St. St. Louis, etc., R. R. 118 U. S.:

> "We must not shut our eyes to the fact that new circumstances and conditions of themselves require and produce a modification of old rules, or the application of new ones."

All that is said in the case of *In re* Sawyer, 124 U. S., 200, cited by defendants, is (p. 210): "The office and jurisdiction of a Court of Equity, *unless enlarged by express statute,* are limited to the protection of property."

Our point is that the protection of Civil Rights was committed to a Court of Equity by the express language of the statute.

The Supreme Court of Virginia, in the case of Wise v. Bigger, Clerk, et al, (1184) 79 Va., 269, held that it had jurisdiction to declare what acts of the general assembly were and what were not law, and upon the petition of a citizen it had the right to compel the keeper of the rolls to strike from the legislative rolls and the superintendent of public printing to omit from the acts of assembly, an act which in the judgment of that Court was not law.

Yet the Attorney General of Virginia, in the Court

below, denied the power of a Federal Court to consider whether acts, under color of which State officers were proceeding, were spurious or genuine, constitutional or unconstitutional, although they might sweep away from a hundred thousand citizens of the State, Federal rights guaranteed to them by Federal law with the duty of protecting them committed to the Court to which the appeal was made.

Again quoting the language of Judge Bradley, we say:

> "Is this law? Is it American law? I cannot believe it."

SECOND. The Court had jurisdiction of the bill in equity and should have granted the injunction.

The cases cited above, in discussing the jurisdiction generally, show how the jurisdiction in equity has been invoked and exercised in cases similar to this.

There was no other adequate relief.

The suit was brought by individuals, but for the relief of a class, and is of a character often sustained both in Federal and State Courts.

Blanton v. So. Fert Co., 77 Va., 335.

The action at law provided by the statute for the redress of individual grievances does not give adequate and complete relief.

That action, however large the recovery in it may be, leaves the law in force; and leaves the plaintiffs disfranchised and deprived of the right of suffrage so long as the officers are allowed to treat the obnoxious law as valid, and run the risk of other personal actions.

It is an intolerable outrage upon a free citizen entitled to vote that he is deprived year after year of his right of suffrage with no recourse but to sue for monetary damages.

Moreover, no matter how outrageous the law may be, it is certainly doubtful, as juries in Federal Courts are summoned and constituted under existing laws, and liable as they are to have upon them partizan opponents who would never consent to give damages for a political wrong, whether it will ever be possible to recover damages in a personal suit; and even if judgment for damages be recovered, it by no means follows that the effect will be to force the repeal of the obnoxious laws. The men who passed these laws are in possession of the State legislature; they can and will appropriate money out of the public treasury to defend the suits brought by individuals to obtain redress for the enforcement of these laws. It is doubtful how many of the perpetrators of these offences are responsible pecuniarily—It is also certain that every obstacle which can be interposed by the individual defendants and State authorities, to make the personal actions futile, will be placed in the way of recoveries.

It is proper that a Court of equity should interpose to prevent these vexatious and outrageous wrongs, and a multiplicity of suits.

If, therefore, the case be not one in which the State is a necessary party, or of such political character that the Courts have no cognizance of it, the equity jurisdiction is the reasonable and proper jurisdiction to invoke.

If it cannot be invoked, and a great throng of citizens of the United States, injuriously affected by the enforcement of this law, cannot bring a class suit for redress, and have no relief but individual actions at law for redress, then the boast of our profession that there is no wrong without its remedy, and the Federal promise of relief, are mockeries, farces, and delusions.

The Supreme Court of the United States in the case of Yick Wo v. Hopkins, 118 U. S. 356, found no difficulty whatever in sustaining the jurisdiction to protect the citizens of the Chinese Empire. It was called upon to construe an ordinance, enacted under the authority of a State, conferring arbitrary power to give or withhold certain rights, without regard to the competency of the applicants or the propriety of their places, and without regard to discrimination in the legal sense of the term. It held those ordinances void and repugnant to the XIVth Amendment. It listened not, for a moment, to the plea made by the officers administering these vicious laws that they were the representatives of the State, or that the controversy was of a political nature. It recognized its duty to uphold the law entrusted to it for the protection of citizens of the United States and all others under her protection. It exercised the undoubted jurisdiction it possessed, and it went further and declared that though the law itself be fair on its face and impartial in appearance, yet, if it were applied and administered by public authority with an evil eye and an unequal hand,so as to make unjust discriminations against citizens of the United States—discriminations as intolerable, as slavery itself—there was no doubt of the power of the Federal Courts to interpose Federal authority to enjoin the attempted enforcement of the obnoxious law.

This Court as late as 1898, in the case of Williams v. Mississippi, 170 U. S. 213, while declining to exercise jurisdiction in that case, because it had no facts before it, cited approvingly the decision in the Yick Wo case. While it refused, in the Williams case, to argue from the probable to the actual, it intimated clearly that if the facts had been apparent, as in the

Yick Wo case, it would have entertained no doubt of the jurisdiction.

The facts in this case appear in the pleadings and, by the manner of the decision, must be assumed to exist as if the case had been decided upon a demurrer to the bill. If those facts do not constitute grounds for Federal interposition and relief, then there is no case in which wronged citizens of the United States can obtain redress in Federal Courts, if the State statutes under which they are wronged, have even the color of adoption and enforcement by the States which oppress them.

THIRD. The Circuit Court had jurisdiction to invoke and apply the particular remedy of a writ of prohibition.

The Circuit Court had the jurisdiction in prohibition, not only by virtue of Section 1979, which authorized the injured party to seek relief by "other proper proceedings for redress," but by the express terms of Section 722, which authorized the Circuit Court in cases arising under the Civil Rights law, to utilize the remedies prevailing in the State Courts, notwithstanding those remedies might not have been available theretofore in the Federal Court, or might not be available there still, in cases of another class.

It seems to us there can be no doubt about this, reading Section 722, of the Revised Statutes.

Something was suggested by the Honorable Chief Justice, during the argument below, to the effect that it had been contended that the jurisdiction act of August 13, 1888, (Supp. to Revised Statutes, Vol. 1, p. 611) modified or repealed the 12th and 16th paragraphs of Section 629, conferring jurisdiction on the Circuit Court, or Section 722, enlarging and adapting the procedure of Circuit Courts in Civil Rights cases.

Surely there can be nothing in this suggestion. On the contrary, the act itself (Sec. 5, p. 614) expressly preserves Section 722, and the remedies accorded under the Civil Rights Act.

We hold that under the above acts the Circuit Court had jurisdiction in prohibition in these Civil Rights cases, to the full extent, and by the same methods of procedure, as the State Courts of Virginia and West Virginia.

So holding, we insist that, if we show that the writ of prohibition is the proper writ to afford the relief asked; that the writs of prohibition and mandamus have been for many years, constantly employed in the State of Virginia and West Virginia, to redress grievances of this identical character; and that they are still in constant employment by those State Courts; it was the duty of the Circuit Court to recognize that fact and grant the relief prayed for, in the form in which it was asked.

We insist, moreover, that the authorities cited by the other side, tending to show the restricted use, heretofore, by Courts of the United States, of the writ of prohibition in cases of a class altogether different from Civil Rights cases, have no bearing whatever upon our contention and should not be considered as defeating our right, in face of the plain authority, and duty to use this writ, enjoined by Section 722.

Section 722 expressly provides that the jurisdiction conferred upon the Circuit Court by the provisions of the title "Civil Rights," for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; and then the section adds that where

the laws are not adapted to the object *"or are deficient in the provisions necessary to furnish suitable remedies, the common law, as modified and changed by the constitution and statutes of the State, wherein the Court having jurisdiction of such civil cause is held * * * * shall be extended to and govern the said Courts on the trial and disposition of the cause."*

Now it is frankly admitted that the use of the writ of prohibition, in the Federal Courts prior to this act had been narrow and circumscribed; and if the power of the Circuit Court to employ the writ rested solely upon the *nisi prius* decisions rendered in litigations of a different character and before this enlargement of the jurisdiction, there would be small ground to contend that the use of the writ in these proceedings was justified by precedent.

But every case cited by counsel for the defendants in the Court below, showing that the use of the writ of prohibition in Federal Courts is limited and curtailed, arose upon the old State of the law.

We are now however to consider whether the availability of the writ in a "Civil Rights" case is not expressly granted, and whether jurisdiction and authority to use it is not distinctly created and extended, to the Circuit Court, by Section 722.

The nature of the writ of prohibition is thus described in the following leading authorities:

> "It was originally understood to be a writ issuing out of some Superior Court directed to the Judge and parties of an Inferior Court. But in practice it has gone beyond this limit, not only to restrain inferior judicial tribunals, but their collateral proceedings. Nor has it been confined entirely to inferior judicial tribunals as seemed first to be intended; on the

contrary, it has been extended to other public functionaries, officials, and persons, charged with the performance of a duty not wholly judicial and not even very expressly or strongly marked with a judicial character.

The writ of prohibition lies from a Superior Court, not only to inferior judicial tribunals, but to inferior ministerial tribunals possessing incidental judicial powers and known as quasi-judicial tribunals, and also in extreme cases to purely ministerial bodies when they usurp and attempt to exercise judicial functions."

Am. & Eng. Ency. of Law, Vol. 19, old Ed. 275.

The same authority, speaking of commissioners assembled in special session to ascertain the result of an election, says:

"Aside from the quasi-judicial functions necessarily incident to their duties in determining that the ballots, poll books and certificates of the election returns laid before them are genuine that *they are in fact the returns* and substantially in the form prescribed by the statute and to correct or have them put in form if they are not so."

The cases cited in connection with the above authority are:

Connecticut River Ry. Co. v. County Comrs., 127 Mass. 50; 3 Hill, South Carolina, 314.

And the following English cases are also cited:

Toomer v. London &c. R. R., L. Rep. 2nd Ex-Div. 451.

The Great Western R. R. Co. v. Ry. Comrs., L. R., 7 Q. B. D. 182.

Great Western R. R. Co. v. Wetherford &c. Ry. Co., L. Rep., 17 Chans. Div. 493.

In Spelling on Injunctions and Other Extraordinary remedies (Ed. 1901, Vol. 2, Sec. 1744), it is said:

"Commissions and other bodies are often vested with judicial powers in the performance of their duties in carrying out the office of their creation; and where such quasi-judicial bodies exceed their judicial powers, *or attempt to usurp unauthorized judicial powers*, prohibition will lie against them * * * *

"On a similar principle such writ will lie from the Judge to the County Commissioners assembled in special session to ascertain the result of an election to prevent them from transcending their powers."

The same authority says:: (Sec. 1720).

"It is no defense to the writ that the act sought to be prohibited is ministerial merely, if the party prohibited is part of the machinery of the obnoxious law and the instrument in the attempt to make its prohibitions effectual when it is void."

And Bailey on Jurisdiction (Ed. 1899, Sec. 446), says:

"The writ lies where, although the body prohibited may have jurisdiction of the subject, some question arises which is not within the power of the body to decide."

The same authority (Sec. 452) declares that it is employed to restrain election commissioners from transcending their powers.

High on Extraordinary Legal Remedies (3rd Ed. 1896, 715) describes the writ of prohibition as follows:

> "It is a proceeding wholly collateral to the proceeding assailed, intended to arrest that proceeding and prevent its further prosecution by a Court, *or a board,* or a person having no jurisdiction of the subject matter in dispute.
>
> It is the means by which a superior exercises its lawful jurisdiction to restrain an inferior and keep it within the bounds of its jurisdiction.
>
> It is a civil proceeding to prevent the further exercise of an unwarranted jurisdiction."

And again it is said at Section 778a, that it is granted against Boards of County Commissioners to prohibit them proceeding *under a law which is unconstitutional.*

The same authority declares:

> "The appropriate function of the remedy is to restrain the exercise of unauthorized judicial or quasi-judicial power, which is regarded as a contempt of the State or Sovereign, and which may result in injury to the State or to its citizens."

Three conditions are necessary to warrant the granting of the relief:

1. That the Court officer or person against whom it is sought is about to exercise judicial or quasi-judicial power.

2. That the exercise of such power is unauthorized by law.

3. That it will result in injury for which no other adequate remedy exists.

And the remedy may be invoked against any body of persons or officers assuming to exercise judicial or quasi-judicial powers, although not strictly or technically a Court.

Spelling on Injunctions and other Extraordinary Remedies (Sec. 1718) also says:

> *"The writ is sometimes termed the counterpart of mandamus. It is the counterpart in the manner in which it operates being negative, while mandamus is positive in its command."*

High on Extraordinary Legal Remedies (Sec. 733 and Sec. 779) says:

> "It is a prerogative writ usually issued in England in the name of the King; in this country in the name of the State.
>
> The governing principle in such cases is that when an inferior tribunal proceeds in excess of its lawful jurisdiction, it is chargeable with a contempt of the sovereign as well as a grievance to the party injured. It may be issued at the instance of a stranger."

And Section 781 says:

> "The province of the writ is not necessarily confined to cases where the inferior is absolutely devoid of jurisdiction; *it extends to cases where the inferior, although rightly entertaining jurisdiction of the subject matter in controversy, exceeds its legitimate powers.*"

While it is not insisted that the writs of prohibition and mandamus are in any way identical, it is respectfully urged that in a case where the sole object of the proceeding is to restrain a defendant, such as a body of election commissioners, from proceeding under an invalid law or otherwise exceeding their lawful authority, the writs of prohibition and mandamus are only distinguishable from each other in this; that if all to be accomplished is to forbid their doing certain things the writ of prohibition is sufficient; while if the command is to be more than a prohibition and

is to go further and order them to do something positive, mandamus is the proper remedy. In this sense the two writs are counterparts of each other and, as we shall show, they have been employed by the State Courts of Virginia and West Virginia as substantially identical to accomplish the same thing in cases like the present.

As to the nature and office of the writ of prohibition, as employed in modern practice, see:

Sweet v. Hulbert, 51 Barb. 312.

And for a very thorough review of cases, in which mandamus or prohibition will lie against executive officers, even in the Courts of their own State, see the dissenting opinion of O'Brien, J., (1898) in People etc., v. Morton, 156 N. Y. 149.

Cases in which these writs of prohibition and mandamus have been unhesitatingly issued by the State Courts of Virginia and West Virginia, are cited by all the text writers in support of the above views, and it now remains to call attention to the particular circumstances under which these remedies have been invoked and employed in those States.

The two leading cases in the State of West Virginia are the case of Brazie v. Fayette, County Comrs., 25 West Va. 213; and Brown v. Board of Election Canvassers of West Virginia, 32 South Eastern, 168.

In the case of Brazie v. The Commissioners, decided in 1884, Judge Snyder, speaking of the claim that the commissioners were mere ministerial bodies, said:

> "When they say they are a ministerial body, they admit they have no right to do what it is sought to prohibit. And when they are in fact acting judicially, they seek to avoid control by prohibition by merely asserting what is denied by their acts, that they have no judicial power

and are not acting as such. The law regards the fact and not the claim of contestants * * * * It cannot be questioned that a judicial body may be restrained by prohibition from exceeding the powers conferred upon it, or from manufacturing a jurisdiction which does not belong to it. Can it be contended that the law is so defective or absurd that it cannot by the same means restrain any other tribunal, whatever may be its legitimate powers, from wholly usurping or manufacturing a jurisdiction and acting thereunder without a pretense of right, merely because it has no rightful judicial powers? I am satisfied that the law tolerates no such absurdity. In my judgment, therefore, prohibition does lie to restrain the defendants here from acting in a judicial capacity beyond or in excess of the authority conferred upon them."

And the Supreme Court of Appeals of Virginia, in the case of Hogan v. Guigon, 29 Gratton, 707, declared that the writ of prohibition did lie to prevent an excess of jurisdiction, although in that particular case it refused the writ against an error in the exercise of jurisdiction.

Suppose the Board of State Canvassers in these cases had played a game of "Seven-up" or thrown dice to decide whose names they would certify as parties elected to Congress. Does anybody entertain any doubt that the Supreme Court of Appeals of Virginia would have possessed jurisdiction to issue a writ of prohibition against the Board, commanding it to stop playing "Seven-up" or throwing dice? It had no power to play "Seven-up" or throw dice to determine who should receive its certificate.

There can be no doubt of the power of a Court to do this. Its authority to forbid such a board from doing unlawful acts has been repeatedly asserted. The only reason why the Court has resorted to the writ of mandamus more frequently than to the writ of prohibition has been that in most of the cases as is shown by the facts stated, the prohibitory order was not sufficient. Complete justice required some positive action by the party against whom the writ was directed. But if such positive action had not been required, the writ of prohibition would have been all-sufficient. And in the present case the writ of prohibition was all that could be prayed for or granted, for there was nothing remaining to be done by the Board of State Canvassers. The only returns from which they could compute and certify results, were spurious returns.

The gist of the complaint was that the laws of the State had been disregarded; that the returns which the Board was about to compute and certify were nullities; that there were no valid returns for them to compute. Therefore the only writ which could be granted against them was a writ of prohibition.

If there had been any lawful returns before them the prayer would have been for a writ of prohibition prohibiting them from counting any unlawful returns, and a mandamus requiring them to compute and certify lawful returns.

The Courts of Virginia have used the writ of mandamus and prohibition with a free hand.

In the case of Wise v. Bigger, Clerk et al, (1884) 79 Va. 269, the Supreme Court of Virginia held that it had jurisdiction to declare what acts of the general assembly were and what were not laws and to award, upon the petition of a citizen, a mandamus to compel

the keeper of the rolls to strike from the rolls and the superintendent of the public printing to omit from the printed acts of the assembly an act which in the judgment of that Court was not law.

It will be noted that the only reason why this was a writ of mandamus, instead of a writ of prohibition, was that the Court commanded the keeper of the rolls to do the positive act of striking the invalid law from the rolls. If the act had not been upon the rolls the writ of prohibition forbidding the keeper of the rolls to enroll and the printer to print, would have answered every purpose.

In the year 1895, the Court of Appeals of Virginia, in the case of McKinney v. Peers, Clerk, 91 Va. 684, granted a mandamus against the Board of Election Commissioners of Appomattox County, to compel them to canvass the returns according to law and to abstain from considering any unlawful evidence before the Board.

In that case the writ of prohibition would have sufficed, but for the command which was necessary to do the positive act of canvassing and certifying the lawful returns. If, as in this case, all the returns had been nullities and the Court had forbidden them from canvassing them, leaving no returns before the Board to be certified, then the writ of mandamus would have been unnecessary and the writ of prohibition appropriate.

Again in the year 1897, in the case of Cromwell v. The Commonwealth, 95 Va. 254, the Court of Appeals of Virginia held that members of an electoral board might be compelled by mandamus to perform duties imposed upon them by law, and for failure to obey a peremtory mandamus might be punished for their contempt.

In the year 1899, in the case of Keller v. Stone, 96 Va. 657, the Court of Appeals decided that mandamus was the proper remedy to compel the Clerk, then the custodian of the poll books, after the election, to permit a party interested to inspect them &c.

And again in the year 1899, in the case of the Richmond Ry. & Electric Co. v. Brown, the same Court decided that it was the proper function of mandamus to enforce duties growing out of public relations or imposed by statute or in some respect involving a trust or official duty. That even a private person might apply for a mandamus to enforce a public duty, not due to the government as such, without the intervention of an officer of the government.

In the case last named, can there be any question that, if application had been made for a writ of prohibition, to prevent the defendant from violating duties growing out of public relations or imposed by statutes, the Court of Appeals would have granted a writ of prohibition.

Again in the case of Eubank v. Boughton, decided in 1900, 98 Va. 429, the Court of Appeals of Virginia decided that the writ of mandamus is the proper remedy for compelling the performance by a public officer of a duty which is either imposed upon him by law or necessarily results from the office which he holds.

If the prayer in the case had been for a writ forbidding a public officer from violating his public duty, can there be any doubt that the Court of Appeals of Virginia would have been empowered to issue the writ of prohibition?

While the writ of prohibition seems to have been the favorite writ in West Virginia and the writ of mandamus the favorite writ in Virginia, can there be any

doubt that the writs of prohibition and mandamus are the usual and ordinary methods, the "other appropriate remedy," by which the Courts of Virginia and West Virginia prohibit violations of duties or enforce the performance of duties against public officers.

Indeed, in the case of Supervisors of Bedford v. Winfield, 27 Gratton, 329, the Court of Appeals of Virginia, refused the writ of prohibition only upon the ground that the petitioner had another remedy by suit in equity.

In this case the defendants, by their answer, first deny the right to relief by suit in the equity and then deny that the writ of prohibition will lie.

In the case of U. S. v. Reese, 92 U. S., 217, it is said: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected."

Our point is that as to Civil Rights, Congress has varied the form and matter, as indicated.

It is respectfully insisted in the light of these authorities that if these plaintiffs had applied to a State Court of Virginia, instead of coming into a Federal Court to seek redress, the remedy in prohibition would have been available to them; and that, in the Federal Court, by reason of Section 722, the writ of prohibition for the redress of their grievances, was equally available to them and should have been granted.

Touching the argument of the defendants that mandamus or prohibition did not lie under the old federal practice we cite, in support of our contention, that the old practice is modified by the statutes, the following

language of Mr. Justice Harlan in Louisiana v. Jumel, 107 U. S., 763.

> "In all the cases prior to Bath Co. v. Amy, 13 Wall., 244, the want of power in the Circuit Court to issue the writ, in the first instance, and in advance of a judgment establishing the rights of the parties, was put distinctly upon the ground that the whole judicial power of the United States had not been delegated to the Circuit Courts."

And the opinion goes on to point out how, by the subsequent statutes, the judicial power of the United States has been extended to the issuing of the writs by the Circuit Court.

Touching these enlarged statutory powers of Circuit Courts, Mr. Justice Harlan incidentally remarked in the Jumel case that if the case had been removed from the State Court to the Federal Court, the Federal Court might have invoked and employed the writ as incidental to the jurisdiction of the Court from which the case was removed.

In the present cases the power to employ the writs used in the State Courts although the suit is brought in the Federal Court is expressly conferred upon the Circuit Courts by the language of Section 722.

ON THE MERITS.

The Court should have entertained jurisdiction of these cases and should have proceeded to consider them upon the merits to determine whether it would or would not grant an injunction in the one case and a writ of prohibition in the other.

The answers filed traverse no allegation in the bill or petition; and the Court below, in passing on the rules to show cause, refused to admit supporting affidavits and announced from the bench that it had considered the bill and the petition as if the defendants had demurred.

So treating the bill and the petition, the following state of facts was before the Court in each case.

How Virginia has Kept Faith.

1. THE CONVENTION WAS NEVER LAWFULLY ORGANIZED.

The members of the convention declined to take the oath required by Article III, Section 5, of the Constitution of Virginia, under which they assembled. That section is as follows:

"Sec. 5. All persons before entering upon the discharge of any function, as officers of this State, *must* take and subscribe the following oath or affirmation:

I do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of Virginia; that I recognize and accept the civil and political equality of all men before

the law, and that I will faithfully perform the duty of to the best of my ability: so help me God."

The official journal of the Constitutional Convention, which was before the Court on the argument below, shows that upon the day the convention convened, to-wit, June 17th, 1901, one member only, Mr. Summers of Washington, filed his oath of office with the clerk. Mr. Thom, a member from Norfolk, moved that the members should proceed to take the oath required by law. The motion of Mr. Thom remained undisposed of until June 26th, 1901. In the meantime, on the date last named, another member Mr. Wysor, submitted the following resolution:

"Resolved: That members of constitutional conventions are officers and that a provision to this effect may be embodied in the new constitution in unmistakable terms, and that they be required to take the oath of office prescribed by the new constitution."

The proposition requiring the members of the convention to take the oath of office was taken from the table June 26th, 1901, on the motion of Mr. Ayers; and the question was fully debated, upon a motion made by Mr. Harrison for the purpose of securing a direct vote upon the proposition to indefinitely postpone the resolution.

The resolution of Mr. Thom was as follows:

"Resolved: That the convention, without undertaking to decide whether members of this body are officers or not, deem it prudent that the oath required by Section 5 of Article III of the present constitution be taken and subscribed to by the delegates to this convention."

The resolution was supported by an argument of singular ability. (See the official report of the de-

bates in the Virginia Constitutional Convention, published by authority of the Convention in the Richmond Despatch, issue of June 27th, 1901).

Its mover planted himself upon the following propositions:

First: That the convention had its origin in the present constitution of Virginia; was provided for by its terms; was acting under its authority, and was a lawful and constitutional, and not a revolutionary body.

Second: That its members, in the highest sense, were officers of the State.

Third: That the oath prescribed by Section 5 of Article III of the Constitution, under which the convention assembled, was a condition precedent to the exercise of their functions by the delegates to the convention.

The resolution was indefinitely postponed after a debate which fully disclosed the animus of the members of the convention.

The reason given by opposing speakers, in the debate, why they would not take the oath of office, was that they did not consider themselves officers and were unwilling to bind themselves by an oath, which might, even inferentially, bind them to respect the proviso of Article 12 of the then Constitution, which reads as follows:

"That no amendment or revision shall be made which shall deny or in any way impair the right of suffrage, or any civil or political right as conferred by this Constitution, except for causes which apply to all persons and classes without distinction."

The debate, which is a public record and may lawfully be referred to in support of the argument, shows a curious effort to evade the law, and Mr. Thom,

while demonstrating the necessity of taking the oath, in order to make the convention a legal body, gave away the strength of his case by the concession that the convention although assembled under the old constitution, to amend it and revise it, might treat as null and void its limitations upon the power of the convention to alter the suffrage.

His opponents defeated his motion, by plausibly turning that concession upon him and by arguing that if they took the oath to support the constitution, they would be bound by the proviso of the XIIth article to make no amendment or revision of the right of suffrage, or of any civil or political right conferred by the constitution.

In such a body it was easy to defeat three sound propositions by demonstrating one unsound contention of a speaker.

The convention by a decided majority indefinitely postponed the question and its members never took any oath.

The keynote of the discussion was one sentence uttered by Mr. Cameron in the debate, to-wit: That the requirement of the oath, taken in connection with the XIIth Article of the old constitution, would tie the hands of the convention concerning any amendment or revision which it might make, denying or in any way impairing the right of suffrage, or any civil or political right as conferred by the constitution under which they assembled.

There an be no doubt that this was the feeling of the convention which led to the defeat of the proposition to take the oath.

By refusing to take that oath the convention rendered its whole proceedings null and void and of no effect.

In support of this proposition we shall use much of the language and cite many of the authorities used before the convention itself.

The convention was not a revolutionary body, which was a law unto itself, but a constitutional convention, based upon existing constitutional provisions prescribing and defining the limitations under which it might be assembled. It was the child of law and order; the fruit of political health; the outgrowth and development of a pre-existing government. It was not a revolutionary body, the outcome of violence and anarchy, or political disease; or a dispossessing intruder assembled for the purpose of overthrowing an existing and anatagonistic power.

It was a convention co-existing with the form of government then in force and which was to continue by virtue of the old constitution and laws, until the new constitution should be adopted, as contradistinguished from a revolutionary body which contemplated the overthrow of the existing government or rebuilding it *de novo* after it had been pulled down and destroyed.

Much more to the same effect was said, all of which was summed up in the sentence used by the advocate of the resolution: "I am unwilling to accept the delegation which has been given me by my people to come to an orderly and a constitutional body, and then to throw off the limitations which they have put upon me and to become a revolutionist."

Speaking of what the people had done, it could not be better expressed than in the following language by the same speaker.

"They have chosen, in sending us as delegates to this convention, to pursue the orderly and the legal

method. They have determined to amend and revise their constitution constitutionally.

They have started with the Legislature of Virginia, where the constitution tells them they must start.

They have had submitted to them the question, under the terms and under the authority of the constitution, whether there shall be a convention to revise and amend the constitution.

They have voted upon it and have answered in the affirmative.

Then the members of the legislature again, and in obedience to the provisions of the constitution, provided by law for the election of delegates to such a convention.

In every step they have followed the law and every part of the commission we hold, we hold under constitutional warrant and by direct vote of the people.

When we assembled here, we assembled clothed with all the majesty of a constitutional body, with all the right that the people can give under a constitutional warrant and with all the power to act for them in a legal, constitutional way, in the matter of amending and revising their constitution."

Surely no argument could supplement this perfect demonstration of the manner in which that convention was assembled, pursuant to law, and under the methods prescribed by the pre-existing constitution. That the members of that convention, so assembled, were officers of the State and bound to take the oath of office prescribed by Article III and Section 5 of the old constitution, is equally demonstrable.

The first and strongest support of this contention is found in the constitution itself, under which this convention was assembled, in which, *persons elected to any convention to amend or revise the constitution are described as officers of the State.*

It will be remembered that the act of Congress, authorizing the submission of the constitution for ratification or rejection to the people of Virginia, authorized the President of the United States to submit the constitution as a whole or with certain sections to be voted upon separately.

The constitution as passed by the convention of 1867-8, Article III, Section 5, contained not only the language now embraced in it, but an additional paragraph known as the test oath and read, as originally submitted, as follows:

Sec. 5. All persons before entering upon the discharge of any functions as officers of this State must take and subscribe the following oath or affirmation.

I do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of Virginia; that I recognize and accept the civil and political equality of all men before the law, and that I will faithfully perform the duty of to the best of my ability: so help me God.

In addition to the foregoing oath of office the Governor, Lieutenant Governor, members of the General Assembly, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and *all persons elected to any convention* to frame a constitution for this State, or to amend or *revise this constitution in any manner * * * shall before they enter on the duties of their offices, take and subscribe the following oath,"* (which oath was the obnoxious test oath).

President Grant permitted the people of Virginia to vote separately upon this last quoted paragraph, when they voted for the constitution July 6, 1869; and that additional paragraph was voted down by popular vote; so that Section 5, as finally adopted by

the people required only the first oath and omitted the test oath.

But does this fact weaken this palpable evidence, contained in the section as originally proposed, that the framers regarded persons elected to a convention to amend or revise the constitution as officers of this State?

The language was that all persons, before entering upon the discharge of any functions as officers of the State, should take one oath; then, in addition to the foregoing oath certain enumerated officers were required to take the second oath of office.

The argument that "persons elected to a convention" were enumerated because they were *not* officers is certainly absurd, for the Governor, Lieutenant Governor, members of the General Assembly, Secretary of State and all the other persons enumerated, are admittedly, officers of the State. They certainly were not enumerated because they were *not* officers—they were enumerated because, being officers, the second, as well as the first, oath was required of them. This second oath was required of them because they were not only officers, but important officers; and because it was the policy of the framers—a policy reversed by General Grant—to admit persons to certain minor offices, without requiring the test oath, but to exclude from the important officers enumerated in the obnoxious section all persons not free from the "taint of rebellion," as it was then called.

What more perfect demonstration could there be that "persons elected to amend or revise this constitution" were not only regarded as officers, but as officers of the highest grade in the State; from whom a peculiarly exacting oath was to be required before they were to be entrusted with the performance of the duties of the office.

Moreover, the Constitution of 1869 provided (Art. III, Sec. 1) a constituency "entitled to vote for members of the general assembly, *and all officers elected by the people.*"

This was the only constituency existing or provided for these members of this convention.

And the Constitution of 1869, Article III, Section 2, in the language which made the members of the Constitutional Convention eligible as such, defined their position as that of officers in the following words: "All elections shall be by ballot and all persons entitled to vote shall be eligible to any office within the gift of the people."

If they were not officers elected by the people they were nothing. They neither has a status nor a constituency, for no other clauses of the constitution provided that they were elegible or who might vote for them.

The meaning of the language above referred to was construed by the Court of Appeals of Virginia in the case of Black v. Trower, et al., decided in 1884, 79 Va., 123, which declared it to include all offices, as well those filled by the Legislature as those filled by popular vote.

One would think that these intrinsic evidences contained in the Constitution, under which these men met, were sufficient of themselves to demonstrate that they were officers of the State of Virginia; but they had no such effect upon the convention.

Possibly the framers of the Constitution of 1869 did not know what they were talking about.

Possibly the Court of Appeals of Virginia was equally at fault in its decision of what constituted an office.

Let us therefore see what law writers and judges in other jurisdictions have thought of the nature of the

employment and duties of men performing these functions.

"The term 'office' in the Constitution implies an authority to exercise some portion of the sovereign power in making, executing or administering the laws."

Opinions of Justices, 3 Maine Appendix 483.

Judge Marshall said: U. S. v. Maurice 2 Brock, p. 102.

"An office is a public charge or employment." Citing: 7 Bacon's Abridgment, 279, 2 Blackstone, 36.

"An office is a public charge or employment and the term seems to comprehend every charge or employment in which the public is interested."

2 Cowen's Reports, 13. 29 Note B.

"It may be stated as universally true that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such charge or employment is an office and the person who performs it is an officer."

Shelby v. Alcorn, 36 Miss. 289.

"An office has been defined to be a right to exercise a public function or employment to take the fees and emoluments belonging to it."

42 N. Y. Superior Ct. 487. (Olmstead v. Mayor).

An officer is "one whose employment is by the public and the duties entrusted to him are official and a public charge."

Rowland v. Mayor, etc., 83 N. Y. 376.

"Public officers are those who are "elected or appointed by other public authorities and thus trace their title to power and authority either immediately or mediately back to the people."

Fox v. Mohawk, 8 H. R. H. Soc. (1901) 165 N. Y. 525.

Officers are "those in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations, for the control of the general interests of society, is confided."

U. S. ex rel Noyes v. Hatch, Pinney's Wisconsin Rep., Vol. 1, p. 183.

"An office is a public position to which a portion of the sovereignty of the country, either legislative, executive or judicial attaches for the time being and which is exercised for the benefit of the public."

High on Extraordinary Legal Remedies, Sec. 620.

The above definition of High was cited approvingly by the Supreme Court of North Carolina in two cases, viz.:

Eliason v. Coleman, 86 N. C. 239.
Doyle v. Raleigh, 89 N. C. 136.

and in the case of

Clark & others v. Stanley, 66 N. C., 59 (1872), Chief Justice Pearson, one of the greatest lawyers this country ever produced, declared:

"A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This we consider to be the true definition of a public officer in its original broad sense. The essence of it is the duty of performing an agency, that is, of doing some act or acts, or series of acts for the State."

"Public officers are officers by whom the government performs its usual political functions—its functions of government."

Sheboygan Co. v. Parker, 3 Wallace, 93.

"Every man is a public officer who hath any duty concerning the public, and he is not the less a public officer when his authority is confined to narrow limits, because it is the duty and the nature of that duty which makes him a public officer and not the extent of his authority. Carthews Rep. 478-479.

Cited approvingly in Bunn v. The People, 45 Ill. 400.

In the case of Robertson v. Clopton, decided in 1881 by the Court of Appeals of Virginia, it was held that members of the House of Delegates of Virginia were officers of the State. These members are voted for under the same franchise clause of the Constitution of 1869 as members of a convention to amend and revise the Constitution; the electorate of the two is identical; the pay the same; the duration of office uncertain, and the character of representative function identical.

The following expressions also occur in the North Carolina cases above cited: "It can make no difference whether there be one act or a series of acts to be done; whether the office expires as soon as the one act is done, or is to be held for years or during good behavior, it is still an office.

"Duration and salary are not of the essence of public office. The duty of acting for and in behalf of the State constitutes an office."

Authorities might be multiplied indefinitely and from every State in the Union to the same effect, but it is sufficient in conclusion to cite the language of Jameson on Constitutional Conventions, a leading authority endorsed by Cooley as leaving nothing to be said on the subject. Mr. Jameson uses the following language:

"In my judgment there can be but little doubt that a member of a convention is, in the enlarged and proper acceptation of the term, an officer of the State * *

* * A convention is a part of the apparatus by which a sovereign society does its work as a political organism. *It is the sovereign as organized for the purpose of renewing or repairing the governmental machinery. That same sovereign as organized for the purpose of making laws is the legislature; as organized for the purpose of applying or carrying into effect laws, it is the judiciary or the executive.*"

It is confidently submitted that the aforegoing authorities establish beyond any doubt that the members of the Virginia Constitutional Convention assembled June 12th, 1901, were officers of the State of Virginia, and as such bound to take the oath of office prescribed by the Constitution under which they assembled.

The oath prescribed by Section 5 of Article III of the Constitution was a condition precedent to the exercise of their functions by the delegates to the convention.

Whatever may be said on the subject in other States, the line of decisions in Virginia is perfectly intelligible and unbroken.

Pursuant to the requirements of the Constitution, an Act of Assembly was passed in 1870 requiring the oath (See Acts 1869-70, Chap. 20, Sec. 1), and that provision has been retained to the present time and now appears as Section 168 of the Code of 1887 as follows:

"Every person before entering upon the discharge of any function as an officer of this State, shall take and subscribe the following oath (being the oath in the Constitution).

As early as 1849 it was enacted and is still in force (Code of 1887, Sec. 182).

"If any officer or person mentioned in Section 168 * * * * * shall act in his office, post or trust.

before taking such oath * * * * he shall forfeit not less than one hundred dollars nor more than one thousand dollars."

Thus we see a penalty imposed for the wrong of personating the incumbent of an office without having qualified to act. But acting, without taking the oath, does not make a person a qualified officer, as is decided by sundry rulings in Virginia. His acts are null and void and of no effect.

As early as 1867 the Court of Appeals of Virginia in the case of Sawyer v. Corse, 17 Gratton, 230, at p. 244, said:

"A mail carrier who does not take the oath, cannot be regarded as an agent and servant of the government, because the Act requires that he shall take the oath before he enters upon his duty."

And in 1883 three cases were decided by the Court of Appeals of Virginia, in which it was held that officers who failed to take the oath of office vacated their offices.

In Johnson v. Mann, Judge, and Couch, Treasurer, 77 Va., 265, it was decided that a Sheriff must qualify before his term began, and for his failure to do so, the office was vacant.

In Childrey v. Bradley et al., 77 Va., 518, it was held that school trustees, acting as such without having taken the oath of office required by law, had thereby vacated their offices, and others appointed in their place were entitled to qualify.

To the same effect is the case of Owen v. O'Brien, 78 Va., 116.

And in the year 1884, in the case of Branhan v. Long, 78 Va., 352, failure to qualify was held to have vacated the office.

All these authorities were called to the attention of

the convention, and it was deliberately warned in advance that, by its refusal to take the oath, its organization would become invalidated, that it would become a revolutionary instead of a constitutional body; that the validity of its organization was essential to the validity of any constitution which it might adopt; and that even if it submitted its work to its own electorate, the objection that it was acting outside of the law would still be valid. The following authority, from the Supreme Court of Pennsylvania, read to the convention, is equally pertinent here.

"Outside of the law, to take the sense of the people whether a convention should be called and the law to call the convention, no other source has been or can be shown. To make this more distinct, let us suppose a voluntary election unauthorized by law and delegates elected. It is plain a convention composed of such delegates would possess no power to displace the existing government and impose a new constitution on the whole people. Those voting at the unauthorized election had no power to represent or bind those who did not choose to vote. A majority of the adult males possessing the qualification of electors can bind the whole people only when they have authority to do so. *To make this still more plain suppose a constitution framed by a volunteer convention assumed to represent the people and attempted to set it up and displace the existing form of government, it is clear that neither the people as a whole, nor the government, having given their assent in any binding form, the executive, judiciary and all officers sworn to support the existing constitution would be bound, in maintenance of the lawfully existing institutions of the people, to resist the usurpation, even to the whole extent of the force of the State. If overpowered the new government*

would be established, not by peaceful means, but by actual revolution."

The above language was employed by Chief Justice Agnew in the famous case of Wells v. Baine, 75 Penn. St. Rep. 39; and in the same volume, it was also said:

"Where a convention to frame amendments to the constitution is sitting under a legislative act, from which all its authority is derived, the submission of its labors to a vote of the people in a manner different from that prescribed by the act is nugatory."

And in the case of Woods Appeal, 75 Pa. State Rep., 59, it was said:

"Such a convention has no inherent rights; it has delegated powers only, and must keep within them."

These cases are cited approvingly by Cooley in his work on Constitutional Limitations. Note to page 44.

We therefore hold that the convention, by failing to take the oath, was not only not organized in accordance with the law, but was not organized at all; that it was a mere volunteer body, whose actings and doings were binding upon nobody whatsoever.

This point is well expressed in the following language used in the debate in the convention:

"There must be something fundamental to be determined as a matter of law. Where a body declares and puts upon its record the fact that its members will not take an oath; and where the taking of an oath is a prerequisite to the validity of their action, it is not a valid body and that cannot shut the door of the court and cannot shut the door of Congress to inquire into that question."

The registration ordinance passed by the convention attached to and promulgated with the constitution and schedules was a nullity.

A convention summoned and assembled to amend a constitution is not the repository for the time being of all the power in a State.

It is summoned for a specific purpose, to wit: to revise the governmental machinery.

All the powers and functions of the government are not poured into its lap.

On the contrary, the constitution in force and the departments of government organized under that when the constitutional convention assembled, go on performing their ordinary functions.

The legislature or law-making power is not abolished nor is the executive department or the judiciary.

The exercise of their powers by a convention is a revolutionary usurpation.

It is unnecessary, since they are running a parallel course to the constitutional body, and are in full life and activity, with their representative duties assigned to them by the existing constitution.

Those duties can be better performed by those to whom they are usually committed. Moreover, it is unsafe to entrust them all to a single assembly.

This would be true even if the power was granted to the Constitutional Convention to establish a constitution without submitting it to the people.

A convention convened to amend a constitution is not convened, either to fill vacancies in the various governmental departments; or to eject from office persons holding positions in the government by regular election or appointment; or to direct such officers in the discharge of their duties.

IT IS ITS BUSINESS TO FRAME A WRITTEN CONSTITUTION: AT MOST TO ENACT ONE.

It has no power, under such a commission, to discharge the public servants and supplant them by its own appointees.

An attempt to remove officers, appoint others in their place and to instruct its appointees in relation to matters of current policy, is a plain usurpation and a blending with it its ordinary normal functions, of those belonging to the legislature of the State.

Behold what this remarkable constitutional convention attempted!

Under laws existing and unrepealed, Registrars of voters existed in every voting precinct of the State. They had been appointed by Electoral Boards created and empowered by acts of the Legislature, and their terms of office had not expired.

The Legislature was actually in session, having simply adjourned. Its power over the creation, change and abolition of these offices was not only undisputed, but in active existence.

It was not fundamental legislation for this convention to turn out these registrars and reorganize the whole system of registration, under officers of its own appointment. It was a mere temporary administrative measure. It did not permanently modify any law, for it expressly relegated the control of legislation on the subject of registrars to the Legislature after 1904.

In a word, it was going altogether out of the business for which the convention was assembled, and usurping powers belonging to a branch of the existing government.

This is as true, if the power granted to the convention was a power to establish the constitution, as it is if the power was to submit its work to the people for ratification or rejection. This work was not in any

sense establishing a constitution; it was something *ultra vires* to the powers of a constitutional convention.

In the Lousiana Convention of 1844 it was proposed that the convention should fill vacancies in the office of parish judges, and the duty of doing so was claimed to be a matter of vital and pressing necessity, but the convention deemed it the assumption of power unwarranted, and rejected the proposition by vote of 68 to 1.

The question of the power of a constitutional convention to eject from office persons holding positions in the government by regular election or appointment was raised in the Illinois Convention of 1862, but the power was not exercised.

Mr. Jameson in his work on Constitutional Conventions, page 320, Section 325-6, declares that the power to fill vacancies in the government must be denied to a constitutional convention in any case, and further says:

"A convention cannot remove from office or instruct those holding office, by any direct proceeding, as by resolution or vote, applying to particular cases. It is its business to frame a written constitution; at most to enact one. It has no power, under such a commission, to discharge the public servants, except so far as their discharge might result from the performance of its acknowledged duty."

As we have never heard any authority cited to the contrary of this proposition, we feel that it is unnecessary to elaborate it further.

The convention had no power to disregard the limitations upon its powers contained in the fundamental conditions imposed by Congress and by the Constitution of the State of Virginia under which it was assembled.

It did so.

We have already set forth the condition imposed by Congress; the proviso of Article 12 of the Virginia Constitution; and the oath required of these members when they assembled.

The convention assembled was not free to disregard those limitations.

It was said: "If that provision in the constitution which attempts to tie our hands, as to the question of changes which we shall make in the suffrage, is valid, then our hands are tied, and we cannot act constitutionally in defiance of them."

That is true, and we propose to show that the hands of the convention were tied at least to the extent of preventing it from enacting such a measure as it did enact.

For the suffrage provisions enacted by this constitution, whether they express the purpose or not, are capable of such administration as to defy and annul every safeguard of the fundamental conditions, and the terms of the proviso in the constitution; and if maintained at all, they must be maintained by upholding the right of the convention to disregard those limitations.

The following extracts from a speech of Hon. George D. Wise on the floor of the Convention, in a debate upon this Constitution, state the outrage of the soldier and suffrage provisions so forcibly that we quote them at length. Speaking of the understanding clause and soldier clauses he said:

"If this provision, fair on its face, shall be embodied in the organic law of Virginia, and then afterwards shall be so applied by public authority as to amount practically to prohibited discrimination or the denial of equal justice, the person thereby injured, in my opin-

ion, would have the right of appeal to the courts, and I doubt not that in a proper case redress would be afforded. * * * * * It will not, I think, be seriously denied that such a clause might be applied and administered with an evil eye and an unequal hand. Here we have the 'Grandfather Clause,' with all its hideous features. Gentlemen, I am not going to insult your intelligence by debating the question whether it is constitutional. Its purpose, to take away from the negro the privilege of the franchise on account of race, color, or previous condition of servitude, is written in the largest letters right upon its face. But its most objectionable feature is the proposition to establish the hereditary qualification for the suffrage, and the same feature appears in the Glass plan, wherein soldiers and their lawful descendants are exempted from the requirements imposed upon other applicants for registration, that they shall be able to read any section of the Constitution submitted to them by the registrars, and give reasonable explanation of the same; or, being unable to read, shall be able to understand and give a reasonable explanation thereof, when read to them by the officers of registraton. Political rights and privileges are not inherited in America. When the colonies inaugurated the revolution and established free government here upon the North American continent, it was done in resistance to the odious doctrine that offices and privileges should descend from father to son. The Democratic party has denounced in unmeasured terms the imperialistic tendencies in this country, manifested in territorial extension as a consequence of the war with Spain, and in the manner of governing the provinces thus acquired; but here we are asked in the proposition to revive hereditary privileges, to violate an essential principle of our Democratic Republic.

I have a letter here from Hon. John Morgan, Senator from Alabama, one of the strongest, bravest and most eloquent representatives of the South. It was written to a member of the Constitutional Convention of his State in reference to a provision similiar to that which I am considering.

Dear Captain White: The American Revolution was not so much a redress of grievances as it was a struggle to abolish heredity in government. That was the real line of division between Democratic and Regal government and the church established by law. Heredity disappeared, with its associated rights of perpetuity in the ownership of lands, and many minor hereditaments of feudalism, such as titles and tenures and servitudes, when our new Democratic scheme of government was instituted.

Political heredity and all its appurtenances, such as perogative and titular nobility and primogeniture, and all its protecting laws, such as corruption of blood. premunire and excommunication, perished and were placed under the heel of prohibition by our Constitution. Whoever would restore any of these to that extent discredits the cause of the Revolution.

Without suffrage the new system had no possible means of expressing the sovereign will of the people in laws and their enforcement by executive and judicial authority.

These necessary agents of the government by and for the people can only be chosen by voters; and voters could only be created by law, not by inheritance. These voters are chosen representatives to perform the single function of electing the lawful officers of government.

The trust confided in them is personal, and can neither be sold nor delegated, transmitted by inheritance or by will to any other person. It is this quality

ot non-transmissiblity that distinguishes it from the regal form of inheritable power and marks the line of the impassable gulf between regal government and Democratic government. The voters, as a class, or body, have certain physical conditions, such as age and sex, that are necessary qualifications, and certain moral and political qualifications that are personal and independent of inheritable blood.

To make blood the medium of transmitting the electoral power from father to son is to uproot from its foundations the whole system of Democratic government and to reinstate the system and the form of regal government.

The Fourteenth and Fifteenth Amendments have no more to do with this subject than any other part of the organic law.

The transmission ot the electoral power by the blood of inheritance from father to son would destroy all distinction between regal government and Democracy, and would throw the door wide open for a return to the system that the American Revolution abolished. The steps would be few and would be rapidly taken, to the complete restoration of monarchy, so soon as we give to any class of voters the power to qualify their sons as voters by inheritance. In this case it is the first step that tells with fatal and irrevocable effect. The argument is irresistible, that offices should follow the blood if the power that creates them is the blood of inheritance; and this is all that is meant in the British system of titled nobility which alone legislates in the House of Lords and of regal blood and prerogative which upholds the throne, and the power of appointment to office, which is an appanage of the throne and the pardoning power over which the people have no control. * * * *

When such a titled class of voters is created by the organic law it will soon occur to them that no other class should be allowed to note, and they will usurp all power. It is far from being a comfort to me that some negroes are included, and many white men are left out, by the ordinance reported by the majority of the Committee on Suffrage in this ordinance of inheritable blood.

With great respect,
JOHN T. MORGAN.

Warm Springs, Va., July 6th.

Mr. Glass: May I interrupt my friend right there to ask a question? Is it not a fact that notwithstanding that letter from Senator Morgan, the Alabama Constitutional Convention, with great unanimity, rejected his advice and adopted this clause?

Mr. Wise: Conventions very frequently do such foolish things. It is true that the Alabama Convention adopted this clause. I do not know by what majority it was done, but do know that four of its ablest members denounced it as un-Democratic, un-Republican and un-American, as their gifted Senator had done. I had the honor to serve with one of them on the floor of the House of Representatives in Washington, and he was afterwards the Governor of Alabama. He wears an empty sleeve as the result of his devotion to the South, the Hon. William C. Oates. I will briefly quote the language of the protest of the four gentlemen to whom I allude:

'It (the clause in question) establishes a permanent hereditary governing class, which in un-Democratic, un-Republican, and un-American. It is not in keeping with the dignity of a progressive, just, and enlightened State. It insults'—I ask the special attention of the

able and eloquent gentleman from Lynchburg to this—'it insults the white men of Alabama and proclaims their inferiority to the negro by requiring of them as suffragists a lower standard of capacity and intelligence than that required of the negro. It is impracticable of administration.'

Mr. Glass: Just there I would say to my friend that the white men of Alabama went to the polls—those white men who were insulted—and endorsed that very clause.

Mr. Wise: *Oh! yes, sir; but it has not yet been under the inspection of the Supreme Court of the United States. The question as to the validity of a provision in the organic law cannot be determined by a popular election.* 'It is impracticable of administration, owing to the impossibility of tracing with any certainty descent from remote ancestors.'

"But I have another serious objection to the understanding clause contained in the minority plan. It gives to the registrars the right to select the section of the constitution, of which the applicant for registration must be able to give a reasonable explanation.

* * * *

It clothes the registrar with the absolute power to determine what clause of the Constitution shall be submitted to the applicant for registration. Let us take an illustration—not a negro—discard, if you please, the negro from your minds. Suppose that in the midst of political excitement, when passion runs high and partisan zeal is without proper restraint, a white man should apply to the registrar to have his name put upon the rolls. The registrar could submit to him—it is absolutely within his power, under the provisions of this plan, to submit to him—a clause in the Constitution, which the most learned and able lawyer might

find it difficult to understand and give a reasonable explanation thereof. The registrar might submit to an unlettered white man, for explanation, a clause which the judges of the Supreme Court of the United States, or of the Court of Appeals of Virginia, might not be able to agree upon. It will not do to say that an appeal is given from the decision of the registrar to the circuit judge because in that event it would be only within the competency of the judge to decide whether he had given a satisfactory explanation of the clause submitted to him.

In this way, gentlemen of the conference, not only the negro, but the white men of this Commonwealth, would be put in the power of ignorant and depraved registrars, so that one applicant for registration might be subjected to a test entirely different from that to which another might be required to conform. The doors are left wide open for discrimination, and for corruption and fraud."

The language of the suffrage clause in the ordained constitution is as was so forcibly pointed out by Mr. Wise, of itself sufficient to show this purpose; but whether it is sufficient or not, the pleadings aver that in practical operation the law is administered by the public authorities with an evil eye and an unequal hand, so as to make the class complaining of its operation subject to an intolerable discrimination.

Yick Wo. v. Hopkins, 118 U. S., 356.

And the Court below and this Court here, by the manner in which the case was considered and disposed of below, must so regard the administration of the suffrage provisions of the ordained constitution.

The Convention, by its spokesman and its action, and the defendants, by their representatives in the

Court below, denied that the fundamental conditions of the Act of Congress and the proviso of the Constitution of 1869 were binding upon the convention. It was contended as follows:

"The people of one generation, or the people of one time, have no right to bind their posterity, and any effort that is made by the peole of one age, one time or one generation to prescribe the form of government which their posterity shall adopt is absolutely null and void as being beyond even the competency of the people."

Again it was said: "It is not a valid provision of the constitution which attempts to tie the hands of posterity in reference to the character of the changes that the people may make."

Again the fundamental conditions of the constitution were described as provisions "beyond the natural right of the people and in derogation of their inalienable power."

In the argument below this assertion was reiterated, and if there is any other ground upon which the federal law and the constitutional proviso are claimed to be null we have yet to hear it.

This talk seems to have pleased the members of the convention and to have satisfied the representatives of the defendants in the Court below, but we submit that in the light of history and in view of the relations, which the State of Virginia bears to the federal government, it is simply "airy persiflage."

States do not exist by generations. Their laws are not made for generations. Laws enacted by an independent sovereignty, affecting none but its subjects and creating no obligations to any other sovereign, may

be repealable by succeeding powers of the State and subject to no review, however, they may reverse the preceding legislation or policy of the State. Such laws enacted by such a State may be revocable, however they may violate pledges to the citizens of the State or disregard the plighted faith of the sovereign to his people, or the majority to the minority of its citizens. In such a State, independent of any other sovereignty, a citizen may be at the mercy of the sovereign will, or the will of the majority. In such a State the right of self government may be inalienable. In such a State the words of the Virginia Bill of Rights may apply:

"That when any government shall be found inadequate or contrary to these purposes (to the purposes of happiness, etc.) a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."

Is Virginia such a State?

Is not the language of her Bill of Rights necessarily qualified by her membership of the Federal Union?

Unless it is, the Federal Union is nothing, and the doctrine of nullification is more firmly established than ever before.

Unless this is true, the language of the Federal Constitution subscribed to by George Washington, John Blair and James Madison as follows (Art. 6, Sec. 2) means nothing:

"This Constiution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, *shall be the supreme law of the land, and the judges in every state shall be bound thereby any thing in the Constitution or laws of any State to the contrary notwithstanding.*"

While the discussion of this doctrine of the inalienable rights of Virginia was in progress, there was but one allusion to the fact that those inalienable rights were "not to be asserted as trenching upon the Constitution of the United States, which we must keep forever in our eyes."

Even that speaker, while making the concession to the constitution, said nothing of the laws of the United States which shall be made in pursuance thereof.

In fact, although that convention assembled within about one hundred miles of the national capital, there was little to suggest that federal constitution, federal laws or pledges to the government were to be considered as entering in any degree into the deliberations of that body. It seemed as though the masterpart of the federal authority thirty years before, in framing the constitution which it was sought to revise, had been forgotten, and one exuberant orator went so far as to say "they did not wish to bind the men who had turned their faces to the future, and to a better order of things by an oath-bound proposition, which bound them to the dead body of the past; did not wish to put upon any people an oath; tie them up so that they will not to-morrow or next year, or thirty years afterwards, do anything which the necessity of that age may call for, in a particular way."

In a word the fact that Virginia had given any pledges to the United States, or that the United States had exacted any condition from Virginia thirty years ago concerning the fundamental law of Virginia, was lost sight of by the convention in framing the "inalienable rights" of the State, into a fundamental chart of government.

The radical vice of all this consisted in ignoring the fact that Virginia is a part of the Federal government

and not a law unto herself; that the federal government, by an act of January 26, 1870, had required of Virginia the condition "that the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States, of the right to vote, who are now entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now found to be felonies at common law."

It was no more competent for Virginia to disregard that condition now than it was thirty years ago.

It is true that the validity and binding force of that particular condition has never heretofore been directly involved in any suit; but it would have been well if the persons who treated it as a nullity had considered other litigations in which substantially the same question was involved.

By an Act of Congress, dated June 25th, 1868 (15 Stat. at Large, p. 73) admitting the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida to representation in Congress, the following fundamental conditions were imposed:

"That the Constitution in neither of said States shall ever be so amended or changed as to deprive any citizen, or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the Constitution thereof herein recognized."

In the case of White v. Hart, 13 Wall., 646-649, which involved the Constitution of Georgia adopted in 1868, by virtue of the Act of Congress last cited, it was contended by counsel, among other things, "that her Constitution was adopted under the dictation and coercion of Congress, and is the Act of Congress rather than of the State; and that, though a State cannot pass a law impairing the validity of contracts, Congress

can, and that for this reason also the inhibition in the Constitution has no effect in this case."

Replying to that suggestion, Mr. Justice Swayne said:

"Congress authorized the State to frame a new constitution and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress, and was so received and so recognized in the subsequent action of that body. *The State is estopped to assail it upon such an assumption.* Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. *The Act of Congress upon the subject cannot be inquired into.* The case is clearly one in which the judicial is bound to follow the action of the political department of the government and is concluded by it.

The legislation of Congress on the subject of reconstruction has been considered in a great number of cases.

In the case of Texas against White, 7 Wall., 728, the Chief Justice of the United States declared, speaking of the State of Texas in language equally applicable to Virginia:

"The restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible, and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation and afford adequate security to the people of the State."

"In the exercise of the power conferred by the guar-
"antee clause, as in the exercise of every other constitu-
"tional power, discretion in the choice of means is
"necessarily allowed. It is essential only that the

"means must be necessary and proper for carrying into "execution the power conferred through the restora- "tion of the State to its constitutional relations under "a republican form of government, and that no acts "be done and no authority exerted, which is either pro- "hibited or unsanctioned by the constitution."

In the case of White v. Hart, 13 Wall. 646, Mr. Justice Swayne said:

"At no time were the rebellious States out of the pale of the Union. Their rights under the constitution were suspended but not destroyed. Thier constitutional duties and obligations were unaffected and remained the same. A citizen is still a citizen, though guilty of crime and visited with punishment. His political rights may be put in abeyance or forfeited The result depends upon the rule as defined in the law of the sovereign against whom he has offended. If he loses his rights he escapes none of his disabilities and liabilities which before subsisted. Certainly he can have no new rights or immunities arising from his crime. * * * * The legislation of Congress shows that these were the views entertained by that department of the government. * * * * We think it is conclusive upon the judicial department of the government."

Again in the case of Texas v. White, p. 774, it is said:

"The new freemen necessarily become part of the people and the people still constitute the State; the States, like individuals, retain their identity, though changed to some extent in their constituent elements. It was the State thus constituted which is now entitled to the benefit of the constitutional guarantee."

In the cases of United States v. Rees et al., 92 U. S., 214, and United States v. Cruikshank, 92 U. S., 542.,

the power of the government to sustain the rights of citizens and to grant jurisdiction to the federal courts, for the protection and enforcement of those rights, was recognized; and although it was held in those cases that Congress had not provided criminal remedies, the power to grant both civil and criminal remedies was fully recognized, and the civil remedies have been sustained as constitutional. See:

Ex parte Yarbrought, 110 U. S., 655.

Wiley v. Sinkler, 179 U. S., 58, decided in 1900.

Swafford v. Templeton, 185 U. S., 487, decided May 19, 1902.

The State of Virginia is estopped from denying the validity of the fundamental condition imposed by Congress.

She held an election July 6th, 1869, ratifying the constitution, which it is now sought to nullify. She appealed to Congress to admit her upon the terms of that constitution.

She accepted the fundamental condition imposed by Congress and pledged herself to observe it, not only as expressed in the act, but as embodied in the constitution itself.

She was admitted upon her plighted faith and acted under the constitution from 1870 to 1902. Under its provisions all of the elections were held; all her laws were passed; all her official acts were done. In all that period she never said or did aught to question the sanctity of her plighted faith, or the validity of the reconstruction acts.

Can she now repudiate after thirty-three years of loyalty?

Estoppels run against States as against individuals. See:

2 Hermann on Estoppel, Sec. 76-7-8 and 1128.

Especially is this true as to estoppel by legislative enactment.

Watson v. Mercer, 8 Peters, 88.
Sheets v. Shelden's Lessee, 2 Wall., 177.
Branson v. Worth, 17 Wall., 32.
White v. Hart, 13 Wall., 646-649.

In the case last cited it is said, concerning the plea that Georgia acted under coercion:

"The State is estopped to assail it upon any such assumption. Upon the same ground she might deny her ratification of the validity of the constitutional amendments. The Acts of Congress upon the subject cannot be inquired into."

The conditions imposed by Congress do not degrade the State and were not different from those which have been imposed upon other States upon their admission into the Union, and in many instances the conditions so imposed have been either proposed by or voted for by the State of Virginia. When Nebraska was admitted into the Union (See Act of Congress, Feb. 9, 1867, Sec. 3) a fundamental condition was imposed upon her, which was acquiesced in (See laws of Nebraska, 1867, pp. 28-31.)

For a full history of the Act of Congress and her admission thereon see Brittle v. People, 2 Nebraska, 198 and the majority opinion of the Court raises and answers every objection ever suggested, either in the convention or in the argument below, concerning the validity and binding force of those fundamental conditions.

The other cases of fundamental conditions, upon

which States have been admitted, have been hereinbefore referred to and will not be repeated, but a most instructive discussion under the head of "Are the States equal under the Constitution" will be found in Dunning's Essays on the Civil War and Reconstruction, pp. 304 to 352. The author demonstrates that the States, with the exception of the original thirteen, have all been limited and confined, in greater or less degree, by restrictions, conditions and limitations imposed by Congressional enactment. His summing up is as follows:

"In brief it may be summed up thus: Ohio, Indiana, Illinois, Michigan, Wisconsin, Mississippi, Alabama, Louisiana, Arkansas, Minnesota, Iowa, Oregon, California, Kansas, Nevada, Nebraska, Colorado, Montana, the two Dakotas, Washington and Utah have not the right, enjoyed by the original States, of discriminating in land-taxation against citizens of the United States who are not citizens of any State; Ohio, Indiana, Illinois, Michigan, Wisconsin, Louisiana, Mississippi, Alabama, Nevada, Colorado, Montana, the two Dakotas, Washington and Utah are forbidden to establish any rule interfering with the freedom of worship or religious sentiment, while no such prohibition rests upon the other States; Montana, Washington, the two Dakotas and Utah are required to establish non-sectarian systems of public schools; Utah is forbidden to permit the existence of polygamy; Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Arkansas, Louisiana, and Texas are forbidden to amend the franchise clauses of their constitution in certain respects as to which the rest of the States are free from restraint; and finally, Virginia, Mississippi and Texas are forbidden to make race, color or previous condition of ser-

vitude a disqualification for holding office, or to amend their constitutions so as to deprive any citizen of the United States of the school privileges secured therein."

Having thus, as we think, demonstrated that the fundamental conditions imposed by Congress and the limitations of the Constitution of 1869, upon the right to alter the suffrage, were binding upon the Virginia convention, we insist that the Court should have entertained jurisdiction of the case, and, seeing that both the Act of Congress and the proviso of the Constitution had been grossly violated, should have declared the constitutional provisions upon the elective franchise null, void and of no effect.

Much was said in the Court below about the case of Williams v. Mississippi, 170 U. S., 213, decided by this Court in 1898.

That case had no bearing whatever upon this. The decision turned upon the contention that the fundamental clauses in the Constitution of Mississippi denied the equal protection of the laws to all classes contrary to the XIVth amendment of the Constitution. But the Court disposed of the case upon the single question that the provisions for registration did not on their face and in the abstract discriminate between classes, however, the opportunities for discrimination given to the officers might be abused. It then said that there was no evidence of such abuse, and refused to argue from the probable to the actual, in that particular case, in order to construe the provisions as contrary to the XIVth amendment.

But the Court went further also. It planted its decision solely upon two propositions:

1. That the Constitution of Mississippi and its statutes did not *on their face* discriminate between the races, and

2. That in that particular case, owing to the peculiar manner in which the question had been raised, *it had not been shown* that the actual administration of the law was evil. Drawing itself within its narrow sphere, it avoided deciding anything more.

But, as if to intimate what it would have held upon another State of pleadings and proof, it referred approvingly to the decision of the Supreme Court in the Yick Wo case and the authorities cited, in which the facts are not unlike those in these cases, and the rulings are all in favor of our contention.

In the Yick Wo case, thus cited approvingly, many things pertinent to this case were decided, among them the following:

1. That an ordinance conferring arbitrary power to give or withhold certain rights, without regard to the competency of applicants and without regard to discussion in the legal sense of the term, was void as repugnant to the XIVth amendment, and

2. *That a law, however fair on its face and impartial in appearance, if it is applied and administered* by public authority *with an evil eye and an unequal hand, will be held as violating the rights of citizens of the* United States

In this case, unlike the Mississippi case, the fact that the laws are enacted and administered by public authority with an evil eye and an unequal hand are concessums of the pleadings.

The constitution, schedules and ordinances complained of are null, void and of no effect.

It was admitted in the Court below by the Attorney General that the party conventions of Virginia did give

the pledge to the people to submit the constitution to popular vote, and the only suggestion of justification for what actually was done, was the blunt and blurted reluctant reply that the people had the right to change their minds.

There was no pretence that the people ever were consulted. The people who changed their minds were the people, who, after their election, changed their minds about redeeming their pledges to submit the constitution. The people who would have Virginia forget her pledges about respecting the old constitution. They are 47 men a majority of a quorum of one hundred men.

The Constitution of Virginia of 1869, Article XII, Section 2, provided that at such time as the General Assembly might by law provide, the question "Shall there be a convention to revise the Constitution and amend the same?" should be submitted to the people and decided by the electors qualified to vote for members of the General Assembly.

Pursuant to that an Act of the Assembly of Virginia (Acts of 1899-1900, p. 835) was approved March 5, 1900, submitting the question to the electors at an election to be held the fourth Thursday of May, 1900.

Provision was made for taking and certification of the vote. The vote was certified, as required by the act.

By another act of the extra session of the Virginia Legislature, approved February 16th, 1901, (Acts of 1901, p. 62) provision was made for the election of delegates and the assembling of the convention.

The constitution itself was silent upon the question whether the work of the convention should be submitted to the people for ratification or rejection. Certainly no power in the convention to act definitely is to be inferred from that silence.

Such an inference is in derogation of the right of the people to pass upon the work of their own servants.

All text writers declare that such a power is not to be inferred. It must only rest upon an express delegation of authority.

The care taken in the Constitution of 1869, that the people should have a voice in determining whether even special amendments should be ratified or rejected, demonstrates that they had no intention to give any convention power to ordain an entire revision.

Article XII provided for special changes always preserving and guarding the rights of the people. If such special changes were proposed and agreed to by a mojority of one Legislature, it was necessary that they should be entered on their journals with the ayes and noes taken thereon and referred to the next General Assembly to be chosen at the following general election.

So jealous of their rights were the people that the Constitution required those proposed changes should be published for three months previous to the next election; and, even then, if the next General Assembly approved them, it was required to submit them to the people in such manner and at such times as the General Assembly should prescribe.

Thus we see that the smallest amendment of the constitution required popular sanction, after full notice of its character to the people; and we also see that the General Assembly was empowered to enact laws to submit proposed special amendments to the people in such manner and at such time as it saw fit.

When we see such particularity about special amendments and the constitution is silent about the manner in which general amendments and revisions should become operative, can we doubt the power of the General Assembly to provide for the submission of such

general amendments to the people in such manner and at such times as it saw fit?

The General Assembly was the only representative of the people in existence, empowered to determine how a question of that kind should be submitted to the people. It was the only existing representative of the people and whether it had or had not originally expressly granted power to prescribe that a general revision should be submitted to the people for ratification or rejection, the people ratified the exercise of that power by voting for delegates under the proviso of the act that the work of those delegates should be submitted to them. And the delegates elected submitted their candidacy and received their votes under that proviso of the act, and are estopped from denying their election, subject to that qualification, after election under the act and subject to that condition. It was as much a part of the act under which they claim title, that their work should be submitted for ratification or rejection to the people of Virginia as that they should be delegates if they received a majority of the votes. They are estopped by the preamble of the act which declares: "It is now proper to provide plans for the selection of delegates to such convention for the convening of such delegates and the organization of said convention, *and for submitting the revised and amended constitution to the people of the State for ratification or rejection.*"

They were estopped, moreover, by consenting to be candidates for election under the act, the 12th section of which made it obligatory upon them that if their work was finished before October 5, 1901, it should be submitted to the qualified voters of the Commonwealth for ratification or rejection at the general election November 5, 1901; and by the 17th section of the act

which provided that if their revision was not completed before October 5, 1901, it should remain for the next General Assembly to enact such measures as it might deem proper for submitting the constitution to the people for ratification or rejection.

When they presented themselves to the people for election, under the Act of Assembly, the parts of the act which compelled them to submit their work became as obligatory upon them as the parts which made them delegates. This is independent of the confessed fact that during the whole time of their candidacy, both by personal pledge and by party resolutions, they held themselves out as candidates for a limited agency to frame and propose changes and not as candidates for definitive authority to ordain the changes which they might propose. They could no more enlarge the authority conferred upon them, after election under the act which limited it, than they could have changed a power of attorney in a private transaction from a limited and revocable to an unlimited and irrevocable delegation of authority.

The authorities upon this question are overwhelming and absolute.

The talk of members of the convention about the exalted character of their functions is as absurd and stilted as the half civilized proclamations of Venezuela announcing that she is "a cultured nation."

The precedents invoked for such authority do not sustain the pretention at all.

The case of Miller v. Johnson, 92 Kentucky, 589, was seriously cited upon the floor of the convention as justifying the abandonment of all pledges.

The case is not in the least degree pertinent to the issues here. It arose in a State Court upon the issue

whether the judiciary of a State would go counter to the political department of the State in declaring that a constitution was void which had been recognized as valid by the other departments of the State.

The facts of the case in no respect resemble the facts in this case. The Kentucky convention had been elected and required to submit its work to the people. It had enacted the constitution and submitted it to the people, and the constitution was ratified by a popular vote while the convention was adjourned.

The constitution was ratified by a handsome majority. The convention was proud of its work. When it reassembled, flushed by the assurance of popular confidence, it undertook to polish off the phraseology of the instrument as it had been submitted to the people. The changes were principally verbal changes, not material, and they were accepted by the executive department. The constitution thus beautified and adorned, so to speak, but unaltered in substance, was treated as in force for some time before any question arose concerning these changes. Then the question was raised in the State Court and the State Court declared that the changes were not important at most, but that the judiciary of the State felt compelled not to go counter to the recognition of the political department of the same State in declaring the constitution void which had been recognized as valid by the political department.

The decision is most valuable in support of our views, for it plainly declares that as an original proposition a convention assembled under an obligation to submit its work to the people had no right whatever to ordain or proclaim it, and for the further reason that it shows that, however the comity invoked in that cause may exist between several co-ordinate depart

ments of a State government, it is not applicable to a Federal Court, which owes no recognition upon constitutional questions to any department of a State government.

In support of the last proposition we cite the case of Wells v. Bain, 75 Penn. St., 39, which declares: "Such a convention has no inherent rights; it has delegated powers only, and must keep within them."

Von Holst's Const. Law (1887) p. 264 thus denounces the practice of proclaiming.

"Conventions are instruments which the people use for reasons of expediency in constitution making; but their task should always be limited to drafting a plan of a constitution, &c.

It has repeatedly become of the greatest political significance, that conventions—partly by appealing to precedents in the struggle of the colonies with the mother country, and partly in imitation of the convention of the first French revolution—have claimed to be the bearers of the people's sovereignty—a claim that in its final logical results tends to a complete overturning of the fundamental principle of American popular government, that is, transforms popular sovereignty into its very opposite.

This doctrine, which rests on the logical absurdity of a transfer of sovereignty, which is identical with its entire alienation, is constantly losing ground."

Jameson on Cons. Conventions (1887) pp. 490-541.

Cooley Cons. Lim. (1890) p. 43.

Cooley, discussing the formation and amendment of State constitutions, says:

"II. In the original States, and all others subsequently admitted to the Union, the power to amend or revise their constitutions resides in the great body of

the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all State authority, have power to control and alter at will the law which they have made. But the people, in the legal sense, must be understood to be those who, *by the existing constitution,* are clothed with political rights, and who, *while that instrument remains,* will be the sole organs through which the will of the body politic can be expressed.

III. But the will of the people to this end can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be authorized to speak for the people, upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself.

IV. In accordance with universal practice * * amendments to an existing constitution or entire revisions of it, must be prepared and matured by some body of representatives chosen for the purpose. * * It is obviously impossible for the whole people to meet, prepare, and discuss the proposed alterations, and there seems to be no feasible mode by which an expression of their will can be obtained, except by asking it upon the single point of assent or disapproval.

But no body of representatives, unless specially clothed with power for that purpose by the people when choosing them, can rightfully take definitive action upon amendments or revisions; they must submit the result of their deliberations to the people—who alone are competent to exercise the powers of sovereignty in framing the fundamental law—for ratification or

rejection. The constitutional convention is the representative of sovereignty only in a very qualified sense and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass, but the changes in the fundamental law of the State must be enacted by the people themselves.

Cooley's Cons. Limit. (1890) pp. 42, 43 and 44.

Citing: Jameson on the Cons. Convention, Secs. 415, 418, 479, 520.

Some Rare Contrasts.

The portions of the Constitution incorporated in this brief present a ghastly satire upon constitutional government by the majority of the people.

The preamble recites "that the General Assembly of Virginia provided by law for the election of delegates to the constitution, *in pursuance whereof the members of this convention were elected by the good people of Virginia.*"

The act of Assembly referred to, commanded the convention to submit its work to the people.

In its very next recital, the preamble, describes the delegates themselves as the people of Virginia expresses gratitude to God for his past favors and "ordains and establishes" the Constitution; not in pursuance of, but in spite of, the law under which the delegates assembled.

The Bill of Rights, in juxtaposition to the Catalogue of Wrongs upon the elective franchise, reads like a travesty of popular sovereignty.

FIRST.

Article I proclaims that all men are by nature equally free and independent and have certain inherent rights of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.

Article II thereupon proceeds to deprive at least two-fifths of their constituency of the enjoyment of liberty or the right to participate in laws regulating their ownership of property, and leaves their happiness and their safety at the mercy of a government in which they have no voice.

SECOND.

Article I proclaims that all power is vested in and consequently derived from the people; that magistrates are their trustees and servants, and at all times amenable to them.

The Schedule shows that the magistrates who made this declaration refuse to be amenable to the people or to submit their work to them for their approval or rejection, as they were pledged to do; and, declaring that all power is vested in the people and derived from them, undertakes to place the people without their consent, under the fiat government of forty-seven men.

THIRD.

Article I declares that government is, or ought to be, instituted for the common benefit, and that form is best which is capable of producing the greatest degree of happiness and safety, and most secure against maladministration, and that the right to

reform, alter or abolish governments is the right of a majority of the community.

Article II exemplifies this principle by ignoring the will of the majority of the community, by violating the pledges of the delegates, by attempting to institute a government for the benefit, in perpetuity, of a factional oligarchy, with no security against maladministration, with the power of continuing itself indefinitely, in spite of the will of the majority.

FOURTH.

Article I declares that no men or set of men are entitled to exclusive or separate emoluments or privileges, except in consideration of public service and against the principle of heredity.

Article II bestows the right of suffrage, one of the most precious of all popular rights, upon men possessing no other title than that their fathers had been soldiers. It recognizes heredity of the most obnoxious kind, for the father may have been a deserter, and the son may be illegitimate, or even the black son of a white father, and still be eligible to the boon of suffrage bestowed by these patriots.*

FIFTH.

Article I declares that the legislative, executive and judicial departments of the State should be separate and distinct.

Under Article II the Convention, elected for the special purpose of framing a constitution, usurped legislative powers to enact temporary legislation and coerced the executive and judiciary departments by imposing test oaths of allegiance to its work, thus combining all three departments in itself.

* NOTE. We are credibly informed that under this claim a mulatto man registered in one of the Counties of the State, as the "son of a Soldier," and named a Lieutenant-General in the Confederate Army as his father. Thus was registered lawfully a mulatto bastard, under the provision.

SIXTH.

Article I declares that all elections ought to be free and that men having a permanent common interest in and attachment to the community, have the right of suffrage and cannot be taxed or deprived of or damaged in their property, without their own consent, or that of their representatives duly elected or bound by and laws to which they have not in like manner assented for the public good.

Article II proceeds to destroy the lawfully existing electorate of the State; to appoint the designated minions of the convention to restrict the right of the people to vote; to determine who have a permanent common interest with and attachment to the community; to provide for taxing the property of at least two-fifths of the voters of the Commonwealth without their consent; to take from them the right of representation; and to govern them by laws to which their consent is not asked and in framing which they are deprived of all voice.

SEVENTH.

Article I declares that all power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and ought not to be exercised.

Article II, without authority, without the consent of the Legislature, proceeds to suspend existing laws, to put new and invalid laws into execution, and to ordain its own work without submitting it to the people.

EIGHTH.

Article I declares that no man shall be deprived of his life or liberty, except by the laws of the land or the judgment of his peers.

Article II deprives one hundred thousand men of their liberty and their franchise; places their lives in the hands of others, not by the law of the land, or the judgment of their peers, but by the fiat of less than a majority of the convention; defies the law under which it assembled and shamelessly violates the pledges of its members to the people who elected them.

The Schedule demands an oath of allegiance to the work of the convention from every officer in the State, although the delegates to the Convention refused to take or be bound by any oath.

This is the case presented to the Supreme Court of the United States by one thousand outraged citizens of the United States, whose rights as citizens of Virginia have been guaranteed to them by the general government, and stolen from them by a band of usurpers as shameless and defiant as any pirates that ever strode a quarter deck upon the high seas with cutlass and boarding pike.

It is respectfully submitted that they have a case cognizable and determinable under existing federal laws in federal tribunals, and that they are not bound to assert their rights in tribunals of a State whose liberties have been seized by a faction of her people maddened by race prejudice and dead alike to the dictates of humanity, conscience or plighted honor.

Appellants are advised and believe that they will not be turned out of the federal tribunals upon any narrow technical plea of a lack of jurisdiction.

Our wide-spreading tree of Constitutional Liberty, in the grateful shade of which the oppressed of all Na-

tions find rest and peace, is rooted in a soil which was watered by the tears of restless vassals, and is enriched by the blood of rebellious bondsmen, shed lavishly, until they won their struggle for freedom.

Until now, its three great limbs, co-ordinates in the germ, have grown apace, in harmonious development. For over a century they have expanded symmetrically. Each branch, in turn, has brought forth fruit worthy of the parent trunk, in proof that its vital forces were equally distributed from root to trunk and trunk to bough, producing a noble trinity of life, power, strength, and beauty. Each branch has contributed its full share to the glories of the whole: each has in due time borne its burdens.

Has the time come at last when the cut-worn of special pleadings, the blight of self-inflicted doubts, is to sap the growth of one of these great co-ordinates, dwarf it, wither it, and destroy that symmetry of which it is a glorious integral part?

Let it not be said that it failed in strength and life just when it was called upon to preserve liberty and vindicate the supremacy of federal power.

If so it must be we have, indeed, entered upon a new era of Construction.

For over a century the judicial power of this Nation was not interpreted as that of a weak and circumscribed subordinate.

In the past is has played its part, and taken its place, as one of the three great co-ordinate repositories of National authority—nor has it hesitated to assume its lawful authority and enforce its lawful mandates.

In the infancy of the Republic, under the leadership of the great Chief-Justice, it taught the States what sovereignty they had delegated to the Nation.

In the time of State jealousies and antagonisms, it

fearlessly proclaimed to embittered sisters, what, under their bond of Union, they owed to each other.

Silent in war, it was only silent until war culminated in a triumph of Union, which threatened the autonomy of the States.

Then, the federal judiciary spoke again. In the slaughter house decisions, it stretched forth its arms across the troubled waters, and bade them "Peace Be Still." Over the shouts of the conqueror—above the wailings of defeat—its voice was heard—proclaiming what the victor had not won, what the vanquished had not lost—that both should thenceforth stand upon a platform of well-defined rights and duties, of mutual respect, whereby alone that patriotism without which Nations die, might, in time, be restored.

And the Nation, "an indissoluble Union of indestructible States"—the Nation, North and South, accepted its new baptism. Thenceforth it grew not only as a more perfect Union, but daily increased in reverence for the great arbiter, which, unmoved by passion, undismayed by tumult, did Justice.

These things were not accomplished by any weakling.

They are the labors of a giant—accomplished with a giant's strength—proclaimed in a giant's voice.

Nobody has denied that power or questioned that strength.

Nobody has defied those commands. Nay, the people acknowledge it, rejoice in it, and bless the beneficent dispenser.

Once more the federal judicial power is confronted with a great question, as much committed to its keeping as to either of its co-ordinates.

That question is:

May the Status of Citizens of the United States of a particular race—a Status definitely declared by federal laws—be altered by any State or States, in defiance of federal power, in breach of the plighted faith of the States to the Nation?

In our humble judgment something more than the rights of the Complainants is involved.

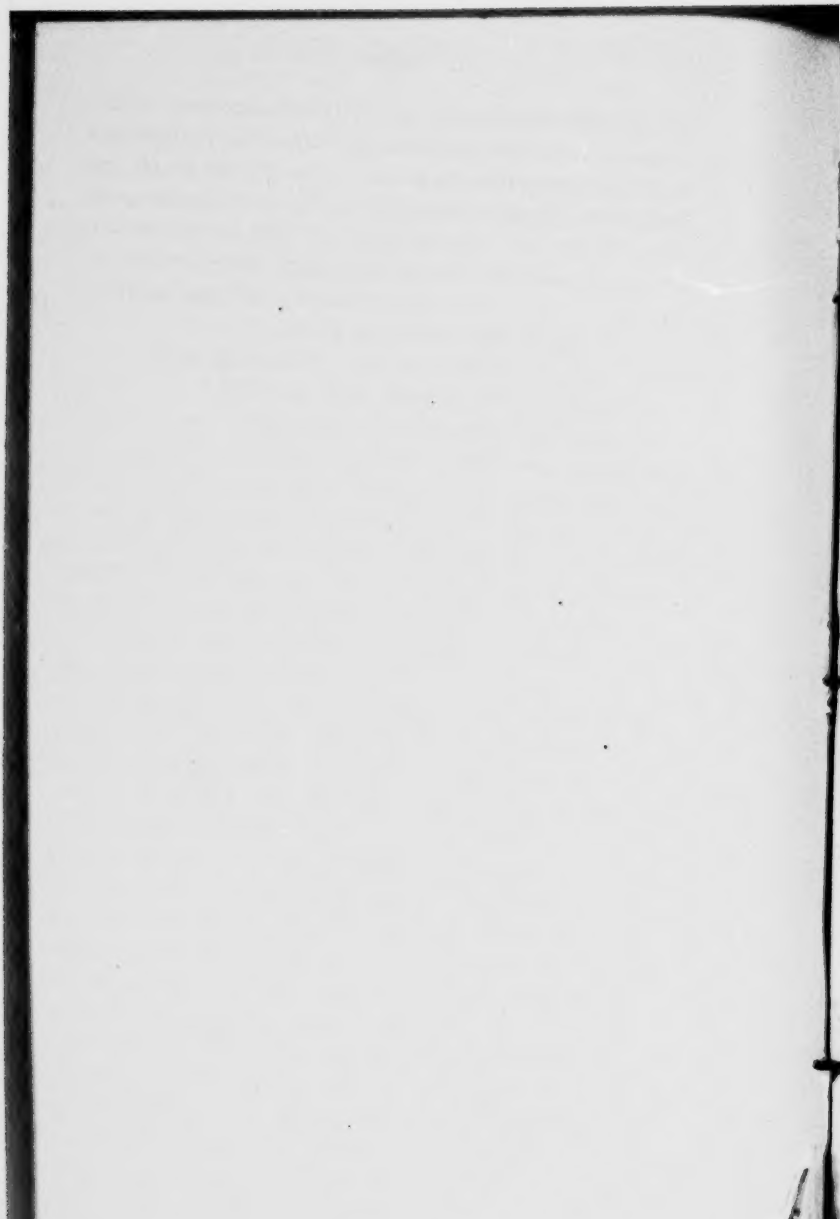
It is a question of federal judicial power.

We maintain that the Government guaranteed the rights of our clients in good faith, and pledged to their protection and their enforcement the whole power of the federal government, legislative, executive, *and judicial*—That pursuant to that pledge it has conferred upon the federal courts the necessary jurisdiction and procedure—That the laws hereinabove set forth were enacted for the express purpose of placing that power in the hands of the federal judiciary, with means of enforcement, as completely as it exists in the executive and legislative branches of the government.

It is incredible to us in the light of the purpose disclosed in the Congressional debates, and of the language of the Statutes enacted, that an outraged citizen of the United States may seek and find redress from the executive or legislative departments, but that department to which is peculiarly entrusted the enforcement and administration of laws for the protection of life, liberty and property is powerless. Until it is announced from the full bench of the Supreme Court, we can never conceive that it will declare to a great throng of outraged federal citizens who apply to it for the protection of federal laws; that although the laws are too plain to be misunderstood; that although the State legislation may be palpably unjust; that although it be defiantly violative of their Civil Rights; that al-

though they may appear both on their face and in the administration unconstitutional, null and void; federal courts are powerless to afford redress; that, so far as federal courts are concerned, outrages by States upon Civil Rights are irremediable. If this indeed be all the power possessed by federal courts, their answer to suitors of this class must be that of the Persian Poet concerning the decrees of Fate:

"The moving Finger writes, and having writ,
"Moves on; nor all your Piety nor Wit
Shall lure it back to cancel half a line
"Nor all your Tears wash out a Word of it."



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Office Supreme Court U. S.
FILED
APR 4 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

SELDEN and others against THE BOARD OF STATE CANVASSERS.	No. 190. On Appeal.
JONES and others against THE BOARD OF STATE CANVASSERS.	No. 189. In Error.

Additional Brief on Behalf of Appellants and Defendants in Error.

The reply brief filed on behalf of appellees and defendants was a mortifying surprise from the foot of page 9 to page 13, inclusive. I frankly confess that my brief from pages 83 to 87 is a remarkable production, and my attention had never been called to the jumble of errors on those pages until it was done so by the reply brief. The utter discrepancy between the quotations on page 84 to page 87 inclusive and the authorities cited to support them would be shocking if the errors were not

so multifarious and flagrant as to carry intrinsic conviction of mistake.

With profound apologies to my opponents for the trouble occasioned to them and thanks for the courtesy with which they have referred to the matter, I respectfully ask leave to substitute the following for the last eight lines of page 83 and pages 84, 85, 86 and the first twenty-four lines of page 87 of my brief, where all this confusion has arisen.

No wonder my opponents were puzzled about the citations referred to as from the American & English Encyclopedia of Law. One of them was incorrect and the other was from 25th West Virginia.

The alleged quotation on page 85 from Section 1720 of 2d Spelling was no quotation at all, but my own paraphrase of Spelling, which I intended to use in argument.

The same is true of the alleged quotation on page 87 from Spelling and the alleged quotation on page 85 from Bailey, and the alleged quotations on pages 86 and 87 from High.

This much of explanation is necessary.

All these authorities were studied at the Bar Association Library, some four miles from my office. On one series of slips I made verbatim transcripts from the authorities, of such expressions as I intended to cite. On another series of slips I made paraphrases of some of those expressions, as I thought they should be read in the light of certain decisions.

For example: In High on Extraordinary Remedies, Section 781, I found the expression, "The province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction, but it is also extended to cases where such tribunal, although rightly enter-

taining jurisdiction of the subject matter in controversy, has exceeded its legitimate powers."

Now, having also found the statement, in the American and English Encyclopedia of law, that the use of the writ of prohibition had not been confined in modern practice to writs directed to inferior judicial tribunals, as seemed to be first intended, but that it had been extended to other functionaries, officials and persons, charged with the performance of a duty not wholly judicial and not even very extensively or strongly marked with a judicial character; and having found in 25th West Virginia authority for the proposition that the writ lies not only to inferior judicial tribunals, but to inferior ministerial tribunals, and in extreme cases to purely ministerial bodies; I made, on a separate slip, a paraphrase of the language of Section 781 in High to the effect that "the province of the writ is not necessarily confined to cases where the *inferior* is absolutely devoid of jurisdiction. It extends to cases where the *inferior*, although rightly entertaining jurisdiction of the subject matter in controversy exceeds its legitimate powers."

In the same way and by the same process of paraphrasing and from the same authorities, I took up page 715 of High and paraphrased the language of that section, so as to argue that the writ would not only prevent further prosecution by a court, but by a board, or a person, having no jurisdiction; and to show that it is not only the means by which a superior court could restrain an inferior court, but is also the means by which a superior court may exercise its lawful jurisdiction to restrain an inferior, whether that inferior be a court, or a board, or a person, and prevent the further exercise of unwarranted jurisdiction.

In the same way, looking at the language of 779 in High, in which it is stated "the governing principle in such cases is, that where an inferior court proceeds

in excess of its lawful jurisdiction, it is chargeable," etc., I, in the light of the statement in American and English Encyclopædia of Law that the principle had been extended to other public functionaries, officials and persons charged with the performance of a duty not wholly judicial and not even very extensively or strongly marked with a judicial character; and of the case of Brazie against Commissioners, 25th West Virginia, prepared a paraphrase of Section 779 of High expressing that the governing principle in such cases is, that when an inferior tribunal proceeds in excess of its lawful jurisdiction the writ will run against it, intending to argue from that the extension of the principle announced by High, so as to embrace not only courts but the other tribunals referred to. This discussion was a distinct feature of the brief.

Somehow, when the brief came to be made up and its different points assembled, all these paraphrases crept into my argument as quotations from the books referred to. I do not know how it happened, except that some two months had elapsed, after I studied and made notes on these authorities, before I wrote up the brief, and that all my paraphrases had at the foot of them references to the paragraphs I intended to paraphrase and discuss. It is probable that when I finally made up the brief I mistook these paraphrases for the original extracts made by me from the authorities and put them in as such, and that never having compared them with the books from which they purported to come, I did not discover the error. I am to blame for it and acknowledge my responsibility.

The following should be substituted for the last eight lines of page 83 and pages 84, 85, 86 and the first twenty four lines of page 87 of my brief where all this confusion has arisen, and I beg the court to disregard altogether what is on those pages.

The American and English Encyclopedia of Law, Volume 19 (Old Ed., p. 275), says it was originally "understood to be a writ issuing out of some superior court, directed to the judge and parties of an inferior court. * * * But in practice this writ has subsequently gone beyond this limit and has been used not only to restrain inferior judicial tribunals * * * but has also reached to their collateral proceedings * * * Nor has it been confined entirely to inferior judicial tribunals, as seemed first to be intended. On the contrary, it has been extended to other public functionaries, officials and persons charged with the performance of a duty not wholly judicial, and not even very extensively or strongly marked with a judicial character."

Bailey on Jurisdiction (Ed. of 1899, Sec. 446) says, "The writ lies only where the subordinate tribunal has no jurisdiction at all in the premises, or where, having jurisdiction, some question arises which is not within the power of the Court to decide."

In the case of Brazie v. Commissioners (25 West Va., 213), it was decided as follows: "The writ of prohibition lies from a superior court not only to inferior judicial tribunals, but to inferior ministerial tribunals possessing incidentally judicial powers and known as quasi-judicial tribunals, and also in extreme cases to purely ministerial bodies when they usurp and attempt to use judicial functions.

In that case the court also said that the functions necessarily incident to the duties of a board of that character, in determining the class of matters brought before them, were quasi judicial functions.

Numerous instances in which the writ of prohibition was used against boards of different kinds appeared in the cases cited as follows: Connecti-

cut River Ry. Co. v. County Commrs., 127 Mass., 50; People v. Road Commrs., 3 Hills (South Carolina), 314; Toomer v. London, etc., R. R. Co., L. R., 2 Ex. Div., 450; Great Western R. R. Co. v. Ry. Commrs., L. R., 7 Q. B. D., 182; Great Western R. R. v. Waterford, etc., R. R. Co., L. R., 17 Ch. D., 493.

In Spelling on Injunctions and other extraordinary remedies (Ed. 1901, Vol. 2, Sec. 1744) it is said: "Commissions and other bodies are often vested with judicial powers in the performance of their duties and carrying out the objects of their creation; and where such quasi judicial bodies exceed their judicial powers, or attempt to usurp unauthorized judicial powers prohibition will lie against them. * * * On a similar principle such writ will lie from the judge to the county commissioners assembled in special sessions to ascertain the result of an election, to prevent them from transcending their powers, &c."

The particular powers that were being transcended in the case referred to were that the board was examining witnesses and hearing evidence, but I take it there is no difference in principle between transcending their powers in that respect and in any other respect.

High on Extraordinary Legal Remedies (3d Ed., 1896, page 715) describes the writ of prohibition as a civil proceeding to prevent further exercise of an unwarranted jurisdiction, and High, at Section 778a, expressly declares that it is granted against Boards of County Commissioners to prohibit them from proceeding under a law which is unconstitutional.

In the present case the contention is that the Board of State Canvassers, in conspiracy with the members of the convention and other state officers, was proceeding under a law which was unconstitu-

tional; that it knew the registration was based on a void and unconstitutional ordinance; and that the returns were based on a vote cast under that void registration.

In Bailey on Jurisdiction (Ed. 1899, Sec. 446) the doctrine laid down by High is approved; that is to say, that the writ lies where, although the body prohibited may have jurisdiction of the subject, some question arises which is not within the power of the body to decide.

And the same authority (Sec. 452) refers to the use of the writ in restraining election commissioners from transcending their powers.

High on Extraordinary Remedies (p. 708, Sec. 764a) declares that the appropriate function of the remedy is to restrain the exercise of unauthorized judicial or quasi-judicial power, which is regarded as a contempt of the state or sovereign and which may result in injury to the state, or to its citizens, and that the conditions which warrant the granting of the relief are as follows:

1. That the court, officer or person against whom it is sought is about to exercise judicial or quasi judicial power.

2. That the exercise of such power is unauthorized by law.

3. That it will result in injury for which no other adequate remedy exists.

There can, as it seems to me, be no reasonable doubt, in the light of these authorities, that the remedy may be invoked agalnst any body of persons or officers assuming to exercise judicial or quasi judicial powers, although not strictly or technically a court.

Spelling on Injunctions and other extraordinary remedies (Secs. 17-18), also says: "The writ is sometimes termed a counterpart of mandamus." It is the counterpart in the manner in which it

operates, being negative, while mandamus is positive in its command.

High on Extraordinary Legal Remedies (Sec. 773 and Sec. 779), says that the governing principle in such cases is that where an inferior court proceeds in excess of its lawful jurisdiction, it is chargeable with contempt.

Of course the same language is equally applicable to any inferior judicial or quasi-judicial tribunal.

High also says in Section 781, the province of the writ is not necessarily confined to cases where the subordinate court is absolutely devoid of jurisdiction; it extends to cases where such tribunal, although rightly entertaining jurisdiction of the subject matter in controversy, has exceeded its legitimate powers.

In view of the extension of the use of the writ of prohibition to proceedings against parties and individuals other than courts, it would be equally proper to say that, the province of the writ is not necessarily confined to cases where the inferior is absolutely devoid of jurisdiction, it extends to cases where the inferior, although rightly entertaining jurisdiction of the subject matter in controversy, exceeds its legitimate powers; and it would also be perfectly proper to add "and to cases in which the inferior is attempting to proceed under a law which is unconstitutional."

The term "inferior" is substituted for the term "subordinate court," as used by High, because the writ, as above pointed out, now often runs to bodies or individuals who are not courts.

Respectfully,

JNO. S. WISE.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 189.

WILLIAM H. JONES, JOHN HILL AND EDGAR POE LEE, Plaintiffs in Error,

vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA; D. Q. EGGLESTON, SECRETARY OF THE COMMONWEALTH OF VIRGINIA; MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS OF VIRGINIA, AND OTHERS, Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OF THE LOWER COURT.

Now come the defendants in error, by their counsel, and move the court to dismiss the writ of error in the above entitled cause, upon the ground that there is now no actual controversy involving real and substantial rights between the parties to the record, and no subject matter upon which the judgment of this court can operate; or to affirm the judgment of the Circuit Court of the United States for the Eastern District of Virginia in this cause, on the ground that although the record shows that this court has jurisdiction, the questions on which the jurisdiction depends are so frivolous as not to need further argument.

William A. Anderson
Frank W. Christian
Counsel for Defendants in Error

NOTICE OF MOTION TO DISMISS OR AFFIRM.

John S. Wise, Esq.,

Attorney for Plaintiff in Error:

Please take notice that on Monday, the 29th day of February, 1904, at the opening of the court, or as soon thereafter as counsel can be heard, the above motion to dismiss the writ of error, or to affirm the judgment of the lower court in the above entitled cause, will be submitted to the Supreme Court of the United States, at Washington, in the District of Columbia, for the decision of said court thereon.

Annexed hereto are copies of the briefs of argument, which will be submitted with said motion in support thereof.

William A. Anderson
Frank W. Christian
— Counsel for —
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO DISMISS.

This motion to dismiss this writ of error is founded upon the ground that everything sought to be prohibited in this proceeding has already been done, and that nothing remains upon which any order of the court can operate.

After the lower court refused the prohibition prayed for in this case, the Board of State Canvassers of Virginia met and canvassed the returns for members of the House of Representatives, and the Secretary of the Commonwealth of Virginia issued writs of election to the members of the House of Representatives elected at such election. The Honorable Carter Glass, who was elected to fill an unexpired term in the Fifty-seventh Congress from the Sixth District of Virginia, appeared and was admitted to take his seat in the House of Representatives under said election, in December, 1902; and he and the other members of the House of Representatives elected at said election to the Fifty-eighth Congress, have since been allowed to take their seats in the House of Representatives as representatives from Virginia under the said election.

We think this court may take judicial notice of these facts. However, we submit herewith an affidavit showing the action of the Board of Canvassers and the Secretary of the Commonwealth; the other facts stated appear upon the Congressional record.

Nothing, therefore, remains to be done in this case upon which the decree of the court can operate.

The suggestion made by opposing counsel that the proceeding involves the validity or invalidity of the election held on November the 4th, 1902, and the Constitution and ordinance of registration of Virginia, and, therefore, the future rights of the complainants, is without force; for it is manifest that a decree adjudicating those questions would be merely upon abstract or moot questions; and it has been uniformly held that the court will not undertake to pass upon such questions. We, therefore, submit that this writ of error will be dismissed upon the ground above stated. See *Mills* v. *Green*, 159 U. S. 651, and cases cited; *United States* v. *Hoffman*, 4th Wallace, 158.

State of Virginia,
City of Richmond, to-wit:

I, David Q. Eggleston, being duly sworn, do hereby state as follows:

I was, in the year 1902, Secretary of the Commonwealth of Virginia, and as such a member of the Board of State Canvassers of Virginia. After the Circuit Court of the United States for the Eastern District of Virginia rendered its judgment and decree dismissing the petition for a writ of prohibition and the bill praying for an injunction in the two causes of "William H. Jones and others against Andrew J. Montague, Governor of Virginia, and others," and "William S. Selden and others against Andrew J. Montague, Governor of Virginia, and others," to-wit, on the 29th day of November, 1902, the said Board of State Canvassers of Virginia convened at the office of the Secretary of the Commonwealth of Virginia, and, in accordance with the law of the State of Virginia in such cases, proceeded, upon the certified abstracts on file in the office of the Secretary of the Commonwealth, to examine and make statements of the whole number of votes given at the election held on November 4th, 1902, for representatives in Congress; which statements showed the names of persons to whom votes had been given at said election for said offices, and the whole number given to each, distinguishing the several districts, cities and counties in which they were given; and the said board certified such statements to be correct, and subscribed their names thereto, and determined what persons had been, by the greatest number of votes, duly elected as representatives in Congress from Virginia; and endorsed and subscribed on said statements a certificate of such determination and delivered them to the Secretary of the Commonwealth of Virginia.

And I further state, that on the said 29th day of November, 1902, I, as Secretary of the Commonwealth of Virginia, recorded, in a suitable book kept by me in my office for that purpose, each certified statement and determination as made by the Board of State Canvassers, and on the same day made out and transmitted to each of the persons thereby declared to be elected representatives in Congress from the State of Virginia, a certificate of his election, certified by me under my seal of office.

David Q. Eggleston

I, John S. Eggleston, a Notary Public in and for the city of Richmond and State of Virginia, hereby certify that the foregoing statement was subscribed and sworn to before me, in my said city and State, on this 28th day of January, 1904.

Given under my hand and official seal this 28th day of January, 1904.

John S. Eggleston

Notary Public.

My commission as a Notary Public expires on the 14th day of March, 1905.

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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

WILLIAM H. JONES, JOHN HILL AND EDGAR POE LEE, Plaintiffs in Error,

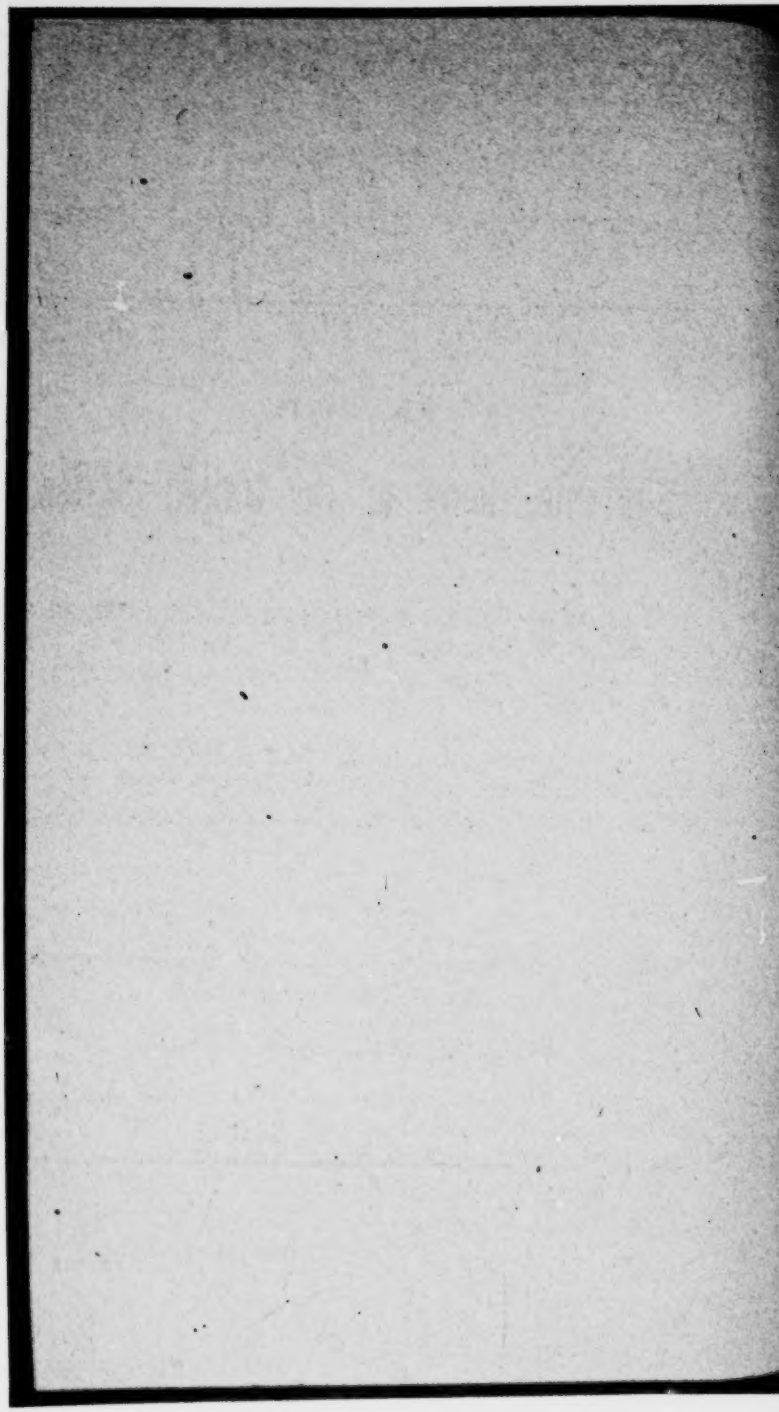
vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA; AND OTHERS, CONSTITUTING THE STATE BOARD OF CANVASSERS OF VIRGINIA, Defendants in Error.

No. 189.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VA.

BRIEF FOR THE DEFENDANTS IN ERROR.



IN THE

Supreme Court of the United States.

WILLIAM H. JONES, JOHN HILL AND EDGAR POE LEE, Plaintiffs in Error,

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No. 189.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VA.

BRIEF FOR THE DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This was a petition for a writ of prohibition filed in the Circuit Court of the United States for the Eastern District of Virginia.

Upon the filing of the petition, the court below issued a rule against the defendants, requiring them to show cause why a prohibition should not issue in accordance with the prayer of the petition.

The defendants filed an answer to this rule, which is, in effect, a demurrer to the petition, setting forth the grounds upon which the court should decline to award a prohibition upon the facts stated in the petition.

Upon the hearing of the rule, the lower court was of opinion that the complainants were not entitled to a prohibition, and

entered an order dismissing the cause; and from this order, the present writ of error has been taken.

The case stated by the petition is, that the petitioners were wrongfully refused registration by the registration officers, though two of them claimed to be entitled to register by reason of property qualifications, and one of them claimed to be entitled to register by reason of the fact that he had served as a soldier and been honorably discharged. It will be observed in passing, that the ordinance of registration gave the right of appeal to any applicant who was refused registration; and the petitioners, therefore, had a clear and ample remedy for the grievance of which they complain, of which remedy they wholly failed to avail themselves.

The complainants do not allege that they offered to vote at all, their grievance consisting in having been refused registration by the Board of Registrars, which rejection they made no effort to redress in the manner pointed out by the registration ordinance.

The provision of the ordinance of registration concerning appeals is contained in section 7, which reads as follows:

> "Sec. 7. Any person denied registration shall have the right to appeal, without payment of writ tax or giving security for costs, to the circuit court of the county, or to the corporation court of the city, in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing, to have his right to register determined, containing a statement of the facts proved before said board, to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

"Upon the filing of such petition, the clerk of the court shall at once give notice to the Commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

"Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor ("of") the petitioner."

The Board of State Canvassers, the defendants to the petition in this case, consists of the Governor, Secretary of the Commonwealth, Auditor of Public Accounts, Treasurer and Attorney-General of the Commonwealth of Virginia, who are constituted the board under section 139 of the Code of Virginia of 1887, which reads as follows:

"Sec. 139. *Duty of State Canvassers.*—The Governor, Secretary of the Commonwealth, Auditor of Public Accounts, State Treasurer, Attorney-General, or any three of them, shall constitute the Board of State Canvassers."

The duties of the board are defined in section 142 of the Code of Virginia of 1887, which reads as follows:

"Sec. 142. *How Election Returns Canvassed by State Board, and Certificates of Election Given.*—For the purpose of canvassing the result of elections, the Board of State Canvassers shall meet at the office of the Secretary of the Commonwealth on the fourth Monday in November next after the election, when they shall, upon the certified abstracts on file in the office of the Secretary of the Commonwealth, proceed to examine and make statements of the whole number of votes given at any such election for Attorney-

General, members of the Senate and House of Delegates, representatives in Congress, and electors of President and Vice-President of the United States, or for so many of said officers as have been voted for at such election, which statements shall show the names of persons to whom such votes have been given for either of the said offices, and the whole number given to each, distinguishing the several districts, cities, and counties in which they were given; they shall certify such statements to be correct and subscribe their names thereto, and they shall thereupon determine what persons have been by the greatest number of votes duly elected to such offices, or either of them, and shall endorse and subscribe on such statements a certificate of such determination, and deliver them to the Secretary of the Commonwealth. The Secretary of the Commonwealth shall record, in a suitable book to be kept by him in his office for that purpose, each certified statement and determination as made by the Board of State Canvassers, and shall, without delay, make out and transmit to each of the persons thereby declared to be elected (except the Attorney-General, who shall be commissioned by the Governor), a certificate of his election, certified by him under his seal of office. In the election of a Senator, he shall also forward to the Senate a certificate of the election of such Senator; and in the case of the election of a member of the House of Delegates, he shall forward to the clerk of the House of Delegates a certificate of the election of such member. And upon the first day of the session of the General Assembly, he shall lay before each house a list of the members elected thereto, with the districts they represent. In cases of special elections to fill vacancies held at

> any other time than that fixed for general elections, the Board of State Canvassers shall meet at the office of the Secretary of the Commonwealth on the day after the returns of such elections are received, for the purpose of canvassing the result of such special elections in the manner hereinbefore set forth; and if all the abstracts of votes to be counted shall not have been received within the twelve days, the said board shall adjourn from day to day until they shall be so received by the Secretary of the Commonwealth."

Sections 139 and 142 were enacted in the year 1870, in substantially the same form in which they now stand in the Code of Virginia. (See Acts of 1869-'70, chapter 76, sections 45, 48, 50.) The said sections, and also the provisions of the Code apportioning representation of the State of Virginia in the House of Representatives, and other provisions relating to the election of representatives from Virginia, contained in the statutes of Virginia, were enacted by the State of Virginia in pursuance of Article I., Section 4, Clause 1, of the Constitution of the United States, which reads as follows:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed by each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

The Congress has allowed the States to make regulations on this subject. Shortly after the Federal Constitution was adopted, Virginia, in pursuance of this provision, enacted laws apportioning her representation in the House of Representatives, declaring when and how members of that house should be chosen, and providing for the return of Congressional elections, and declaring the results thereof. (See 12th Hening's Statutes

at Large, 653; 13th Hening's Statutes at Large, 331; First Tucker's Blackstone, 191.)

These methods have from time to time been changed in form, but regulations on the subject have existed continuously in the statute law of Virginia. The statute in relation to canvassing returns and issuing certificates of election to members of the House of Representatives, being section 142 of the Code of Virginia, already quoted, has been in force in substantially the same form as it now stands in the Code since its enactment in 1870. This statute is a valid act of the Legislature, passed pursuant to the authority granted by the Federal Constitution, and establishes the only method in existence for ascertaining and certifying the results of election of members of the House of Representatives in Virginia.

The respondents were elected to their offices under the Constitution and laws of the State of Virginia existing prior to the adoption of the present Constitution, and the validity of sections 139 and 142 of the Code of Virginia of 1887 is not denied or questioned by the complainant petitioners; nor is the title of the respondents to their offices as *de jure* and *de facto* officers denied.

The acts required by the statute to be done by the State Board of Canvassers could be performed only in their official character as members of the board, and none of the acts could be done by any member of the board alone or individually.

This statement of the facts and the statutes of Virginia, is, we believe, sufficient to enable us to state intelligently the grounds upon which the defendants resisted the application for a prohibition in this case and our reasons in support of that position.

Argument of the Points Presented.

I.

The first objection made in the answer to the petition for prohibition is, that the case is in substance a suit against the

State of Virginia, and prohibited by the eleventh amendment of the Federal Constitution.

Our contention is, that the suit against the Board of State Canvassers is either a suit against the State of Virginia or, if not so considered, that the State of Virginia is an indispensible party to any relief; and, upon either alternative, this proceeding is barred.

In order to determine whether this be a suit against the State or not, it is necessary to enquire what is the nature of the case made, and the precise relief sought, by the petition.

Let it be assumed that a wrong was done the petitioners by the alleged refusal of the registrars to put their names on the registration books; still those wrongs were past when this petition was filed, and the present suit is not brought for the purpose of redressing those wrongs, and no relief granted in this suit could have the effect of redressing those alleged wrongs. The present suit is not for the purpose of recovering damages for the refusal to register the plaintiffs. Being a suit in prohibition, it could not, of course, have that effect. The suit is not brought against the registrars who conducted the registration; it is not brought for the purpose of compelling them to place the names of the complainants upon the registration lists.

The primary right of the voter is the right to register and vote. When the voter sues in damages for the wrongful deprivation of that right, or brings proceedings to enforce specifically its enjoyment, whatever may be the difficulties in the way of the latter remedy especially, he at least does not interfere with the rights and interests of other voters and other members of the body politic in the State. But in this case, the petitioners are seeking to have the court declare the entire election null and void, which was held on November the 4th, 1902, and to restrain the Board of State Canvassers from canvassing the returns from the whole State of Virginia, and to prevent the issuance of certificates of election to the persons who received a majority of the votes cast at that election for members of the House of Representatives.

The relief prayed for could not be granted without affecting the rights of others not before the court. It would restrain the Board of State Canvassers in the performance of duties and functions that are purely political and governmental under the statute law of Virginia—duties and functions devolving upon the board solely as a public agency, in the performance of which, not only the Commonwealth of Virginia, but the United States also, is concerned.

This being the nature of the relief prayed, we submit that the proceeding is one against the State of Virginia, under the decisions of the Supreme Court of the United States.

In the case of *Cunningham* v. *Railroad Co.*, 109 U. S., 452, the Supreme Court of the United States, speaking by Mr. Justice Miller, defined two classes of cases in which suits against the officers of the State may be maintained in the Federal courts. The first class of cases stated by Mr. Justice Miller are cases where the State officers are sued in an action for damages occasioned by an act injurious to the plaintiffs, and where the officers seek to justify their action under a State statute which is unconstitutional.

The second class of cases referred to by Mr. Justice Miller consists of cases in which the Federal courts are called upon by an injunction, or some other writ, to compel or to restrain the doing of some act by a defendant who is an officer of the State. As to this class of cases, Mr. Justice Miller says they can be maintained "where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, *not affecting the general powers or functions of the government*, but in the performance of which one or more individuals have a *distinct interest* capable of enforcement by judicial process."

And Mr. Justice Miller added that in entertaining cases of this class, the Federal courts have gone to the "verge of sound doctrine, if not beyond it, and the principles should be extended no further."

It is plain, we submit, that the present case cannot be brought within the class of cases just mentioned by Mr. Justice Miller.

In the first place, the petitioners have not a distinct or separate interest in the performance of the duties imposed upon the Board of State Canvassers, but an interest in common with every other member of the body politic in Virginia. All persons who voted at the election of November the 4th, 1902, have an interest in the action of the Board of State canvassers in canvassing and certifying the returns of election. All persons who neglected to vote at that election are presumed in law to have assented to the action of the majority of those who did not, and they are, therefore, likewise interested. The candidates for the House of Representatives voted for have an interest; the Commonwealth of Virginia and the United States, both have interests, not of a property or pecuniary character, but they have important interests in their fundamental and political capacities. The State of Virginia is entitled to representation in Congress, and its interests would have been obstructed and interfered with by any prohibition restraining the canvassing of the returns.

The complainants' alleged rights, then, are not distinct and separate rights, as required by the language used by Mr. Justice Miller in the case just cited, which are capable of enforcement by judicial process, but are rights (if they can be properly so called at all) which the petitioners enjoy only as a part of the body politic and in common with all other citizens in Virginia.

When we look, on the other hand, at the nature of the duties and functions of the defendants, it will be seen that they are of a character precisely opposite to what Mr. Justice Miller defines as a condition to the jurisdiction of a Federal court when the suit is brought against officers of a State. He says that the suit must be brought to compel the performance of a well-defined duty in regard to a specific matter, "not affecting the general powers or functions of the government."

In the present case, the duties of the board sought to be restrained are purely governmental, affecting the entire body politic in its relation to the State and the Federal governments. The relief prayed is against the respondents in their political capacity. It constitutes a suit against the action of

the State itself, affecting the interests of the State and the people generally, of which the State itself is the only representative, under the principles of public law. The defendants discharge their duties solely as a board, and, in the discharge of those duties they have no private interest whatever. The Board of State Canvassers is an agency of the State of Virginia, established in pursuance of the Federal Constitution, for canvassing the returns of members of the House of Representatives.

In *McCulloch* v. *State of Maryland,* 4 Wheaton, 316; *Collector* v. *Day,* 11 Wallace, 113, and a great number of other cases, the Supreme Court of the United States has held that neither the United States, nor the several States, can interfere with or obstruct the agencies and instrumentalities of the other sovereignty lawfully existing for the purpose of carrying out its purposes and executing its powers within the sphere of its power and duties.

The judiciary act giving jurisdiction to the Federal courts was never intended to transgress this fundamental rule of the partition of powers between the two governments by allowing the Federal courts to interfere with or restrain a board or agency of the State in the exercise of its political and governmental functions.

If the lower court had granted a prohibition in this case, it would have afforded no redress to the petitioners for the violation of their alleged rights to register and vote, but would only have prevented the Board of Canvassers from certifying the returns of the election and awarding certificates to members of the House of Representatives. In other words, the only effect a judgment, if rendered, would have had, would be, to control the political action of the Board of State Canvassers as one of the agencies of the government of Virginia, without giving any redress for any alleged wrong of the petitioners.

It is well settled that it is not necessary that the State should be made a party in order that the suit may be against her. The suit is equally against her, if against officers of the State and

for the purpose of controlling their governmental or political powers.

We submit, that the present case does not fall within the line of cases in which the Federal courts have taken jurisdiction to control State officers as to some act which the plaintiff was entitled to have performed, or restrained as a matter of individual and separate right, but falls within the class of cases in which jurisdiction has been declined, because the object was to control officers of the State in the discharge of duties relating to the revenue or property or political interests and action of the State. *Louisiana* v. *Jumel*, 107 U. S., 711; *Hagood* v. *Southern*, 117 U. S., 52; *Cunningham* v. *R. R. Co.*, 109 U. S., 446; Ex Parte Ayers, 123 U. S., 443; and cases cited in the foregoing cases; and *McCawley* v. *Kellog*, 2 Woods' Circuit Ct. Rep. 13; *Collector* v. *Day*, 11 Wallace, 113. Fitts v. McGhee, 172 U.S. 516, 525, 530.

II.

It was objected by the defendants in the lower court, in their answer to the rule, that there was no act of Congress giving the United States Circuit Court jurisdiction of this proceeding.

(1) The United States Circuit Court had no jurisdiction of this proceeding under the act of 1887, as amended by the act of August 13th, 1888, giving the United States Circuit Court jurisdiction of all cases at law, or in equity, arising under the Constitution or laws of the United States, where the amount in dispute exceeds two thousand dollars, for the reason that the petition in this case does not show that the amount involved in dispute exceeds the sum of two thousand dollars; and we submit that this objection was sufficiently made in the fifth clause of the answer in the following language:

> "In order that the complainants may maintain this petition, they must show that the case is embraced within the provisions of some act of Congress conferring the particular jurisdiction on this court; and they submit that there is no such act of Congress; and, therefore, the court is

without jurisdiction to entertain this proceeding."

(2) It is plain that this proceeding is not embraced within the purview of section 1979, or clause 16 of section 629 of the United States Revised Statutes. See *Holt* v. *Indiana Manufacturing Co.*, 176 U. S., 68; *Giles* v. *Harris*, 189 U. S.

(3) Opposing counsel seem to contend that jurisdiction is conferred by the twelfth clause of section 629 of the United States Revised States; but it is plain that this clause refers exclusively to suits brought by a person to recover damages for injuries suffered in the execution of the laws of the United States. This is rendered plainer (if possible) by reference to the acts of Congress on which this clause is founded.

(4) Opposing counsel seem also to contend that jurisdiction may be derived in this case from section 722 of the United States Statutes. But this section plainly refers to suits brought for the protection of persons in their civil rights. In addition this section does not confer jurisdiction, but merely adopts forms of procedure prevailing in State courts; and in this purview it does not aid the plaintiffs here, since it is well settled in Virginia that prohibition will not lie in a case like this. See *Burch* v. *Hardwicke*, 23 Gratt., 51.

(5) The only statute of the United States which gives jurisdiction to the United States courts of the writ of prohibition is section 716 of the United States Revised Statutes.

It has been held by the Supreme Court of the United States that writs of mandamus (which, for the purpose of the jurisdiction of the court to issue such writs, stand upon the same footing as writs of prohibition), are not embraced within the eleventh section of the judiciary act of 1789, and, therefore, of course, not within the first section of the Acts of 1887, as amended by the act of August 13th, 1888, giving to the circuit courts jurisdiction of cases at law and in equity arising under the Constitution and laws of the United States, or arising between citizens of different States, &c.

Writs of prohibition and mandamus were considered, at the

adoption of the Federal Constitution and the judiciary act of 1789, as high prerogative writs which were extraordinary in their character, and not issuing as of right. Jurisdiction of such writs was conferred by the fourteenth section of the judiciary act, which, now amended, constitutes section 716 of the United States Revised Statutes, and reads as follows:

> "The Supreme Court, and the Circuit and District Courts, shall have the power to issue all writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

The Supreme Court of the United States has held that the Circuit Courts of the United States have, by virtue of this section, no power to issue original writs of mandamus and prohibition, but only ancillary writs when necessary for the exercise of their respective jurisdictions; that is, for the purpose of enforcing, or preventing interference with, jurisdiction of a case already pending in the court, the said writ being merely auxiliary to, and in aid of, the jurisdiction already rightfully acquired. This subject was considered and it was so declared by the United States Supreme Court in *Bath County* v. *Amy*, 13 Wallace, 244, in respect to writs of mandamus; and precisely the same reasoning which was in that case applied to writs of mandamus is equally applicable to writs of prohibition.

In *Bath County* v. *Amy*, 13, Wallace, 248, this court said:

> "While it may be admitted that, in some senses, the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the judiciary act. * * * Were there nothing more, then, in the judiciary act than the grant of general

authority to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British court of King's Bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the fourteenth section of the same act, which enacted that circuit courts shall have 'power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law.' Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the eleventh section, which conferred, only to a limited extent, upon the circuit courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the fourteenth section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given."

The court further said:

"And in *McClung* v. *Silliman,* this court said, when speaking of the power to issue writs of mandamus: 'The fourteenth section of the act under consideration (the judiciary act) could only have been intended to vest the power . . . in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out.' In other words, the writ cannot be used to confer a jurisdiction which the circuit court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired."

And the court adds:

> "The power to issue a writ of mandamus as an original and independent proceeding does not, then, belong to the circuit courts."

The court then proceeds to say that the process act of 1828 was merely a process act, and did not enlarge the jurisdiction of the United States Circuit Courts.

The court concluded as follows:

> "There is, then, no act of Congress which has conferred upon circuit courts authority to issue the writ of mandamus as an original proceeding, or at all, except when necessary for the exercise of the jurisdiction conferred upon them by law.
>
> "Applying this rule to the present case, it is decisive. The relator's claim for payment had not been brought to judgment in the circuit court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous."

The same principles are laid down in other cases. See *Graham* v. *Norton*, 15 Wall., 427; *County of Greene* vs. *Daniel*, 102 U. S., 187; *Davenport* v. *Dodge*, 105 U. S., 237; *Rosenbaum* v. *Bauer*, 120 U. S., 450; *Smith* v. *Barbour Co.*, 127 U. S., 112; Ex Parte City Bank of New Orleans, 3 How., 292, 322; *In re* Bininger, 7 Blatchf., 59; 67 Federal Reporter, 384; 114 Federal Reporter, 437; *Louisiana* v. *Jumel*, 107 U. S., 727; 2nd Spelling Extraordinary Relief, Secs. 1367, 1737; 1st Desty Fed. Proced. 9th Ed. Sec. 84, p. 341 and cases cited.

III.

Another ground of objection made by the defendants in the lower court was that a writ of prohibition was not an appropriate remedy in this case, for the reasons—

(1) That a writ of prohibition only lies to a court; and,

(2) To an inferior court; and

(3) To restrain such court from acting beyond the bounds of its jurisdiction. See *Birch* v. *Hardwicke*, 23 Gratt., 51, 60; *James* v. *Stokes*, 77 Va., 229; High on Extraordinary Remedies, Secs. 762, 769, 782; 2nd Spelling on Extraordinary Relief, Secs. 1722, 1732; Ex Parte Broadlacht, 2 Hill, 367; *State* v. *Justices*, 41 Mo., 44; *State* v. *Gary*, 33 Wis., 93; 3 Blackstone's Commentaries, page 112; 23 Am. & Eng. Enc. of Law, p. 203, 204, where many cases are cited.

None of these requisites exists in this case:

(1) The Board of State Canvassers is not a court, and does not discharge judicial functions. Its duties are all set forth in section 142 of the Code of Virginia of 1887, except the single duty of determining by lot, in case of a tie, as is provided in section 143. Their duties are ministerial and executive, and not judicial; and no prohibition, therefore, could issue against the said board.

(2) A prohibition can only issue to supervise and control the jurisdiction of *inferior court*. And the Board of State Canvassers is not only not a court, but if it were, would not be a court inferior to the Circuit Court of the United States. Section 720 of the Revised Statutes of the United States expressly declares that a writ of injunction shall not be granted by any United States court to stay proceedings in any State court, except in bankruptcy proceedings. We submit that writs of prohibition are clearly within the spirit of this restriction upon the power of the Federal courts. No doubt, writs of prohibition would have been specifically named in section 720, except that the framers of the act recognized that such writs issue only to inferior courts, and it was not contemplated that courts of State could be considered inferior to the United States

courts, except in cases where appeals are provided for from courts of the State directly to the Supreme Court of the United States. It was said by this court in *Riggs* v. *Johnson Co.*, 6 Wall., 195: "State courts are exempt from all interference by the Federal tribunals * * * Circuit courts and State courts act separately and independently of each other in their respective spheres of action. The process issued by the one is as far beyond the reach of the other, as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the State courts and this court, but there are no such relations between the State courts and the circuit courts." If, then, the Board of Canvassers were a court, this principle would prevent a writ of prohibition issuing to it from a circuit court of the United States.

(3) The office of a writ of prohibition is simply to restrain the lower court from exceeding its jurisdiction. It cannot be used to control the judgment to be rendered by the lower court. The Board of State Canvassers were proceeding under a valid statute of Virginia to canvass the returns from the different congressional districts of Virginia. In so doing, the board was clearly acting within its jurisdiction. The purpose of the writ here was not to keep them within their jurisdiction, but to compel them, in the exercise of their jurisdiction, to decide in a certain way. The writ of prohibition could not be used for such a purpose.

IV.

The United States Circuit Court could not properly interfere by prohibition with the acts of the Board of State Canvassers in canvassing the returns, ascertaining the results of the election for members of the House of Representatives, and issuing certificates to those receiving a majority of the votes cast; for the reason that the exercise of such a jurisdiction would invade the province and independence of the House of Representatives, a co-ordinate branch of the Federal government.

The House of Representatives is, by the Constitution of the United States, made the sole judge of the qualifications and returns of its members. The Board of State Canvassers is an instrumentality created by the State of Virginia, under and in pursuance of the Federal Constitution for canvassing the returns, ascertaining the result and issuing certificates of election to members of the House of Representatives; and we respectfully submit, that it is clearly incompetent for any court to interfere with such an agency in respect to matters of which the House of Representatives is made the sole judge under the Federal Constitution. The exercise of such jurisdiction necessarily impairs, and might be used to destroy the independence of the house itself. We have stated somewhat more fully the grounds of this objection in the brief filed by us in the case of *Selden and others* v. *Montague, Governor, and others,* pending in this court and we will not repeat them here.

V

The next objection made by the defendants in their answer was, that the petitioners did not set forth in their petition any case appropriate for judicial cognizance and relief in any court.

The wrong alleged by them is that the registrars wrongfully refused to place their names on the registration lists. If such alleged wrong was, in fact, done them, it is obvious that the appropriate remedy was in some proceeding against the registrars. The petitioners were given remedies against the registrars for the redress of any such wrong, both by proceedings for specific relief to secure the placing of their names upon the registration lists and by an action for damages. The specific relief was secured them by an appeal to the courts, as provided in section 7 of the registration ordinance already quoted in this brief, by which any applicant for registration, who is denied the privilege of registration, is allowed to appeal to the courts; and if he prevails, it is provided that his name shall be put upon the registration lists. In addition, if he is wrongfully

denied registration, he has his action for damages against the registrars, provided he can make out a case of corrupt and wilful denial of the right to register. Having these remedies, and not resorting to them, we submit it is not admissible for the petitioners to resort to the proceeding by prohibition, which can only be used when there is no other adequate remedy.

In addition, even if the petitioners were awarded a writ of prohibition, it would not remedy the wrong of which they complain, which is that they were refused the right to register by the Board of Registrars, since it would neither place them on the registration lists nor give them damages for the denial of the right to register.

The petitioners are not seeking to protect or vindicate these special and peculiar rights, but in this proceeding are asking the court to restrain all steps to declare the results of an election in which they allege they were denied participation, upon the ground that the law under which the election was held was unconstitutional. It is plain that if the petitioners have any right in respect to that matter, it is one which they enjoy in common with all members of the body politic in Virginia.

We respectfully submit, that the courts have no general jurisdiction to restrain the execution of a law upon the claim that it is unconstitutional, except at the suit of some one who alleges that he has some peculiar and special right of property, or some other distinct right, that will be violated by the threatened action; otherwise, the courts would be constantly engaged in supervising and controlling public officers in the discharge of their political and governmental duties, upon the plea that the statute under which they were acting was unconstitutional.

The duties of the Board of State Canvassers sought to be restrained in this case were not functions in which the petitioners were alone interested, but affected the people of the State gnerally. If the petitioners can be said to have had any rights in proper sense of that term in relation to the canvassing of the returns and awarding certificates of election by the board, they were not rights peculiar to themselves, but rights which they enjoy in common with all members of the body politic in Vir-

ginia; and the effort to restrain the board from performing those duties was not an effort to vindicate special rights enjoyed by the petitioners, but simply to enforce what the petitioners alleged was a public duty of the board—namely, to disregard entirely the election held on the previous 4th of November, on the ground that the law under which it was held was unconstitutional. What was sought, therefore, by the petitioners, was to have the court direct the board in the performance of public and governmental duties.

Courts are not constituted for the purpose of administering such a jurisdiction, and under the system of partition of powers between the different departments of government which prevails in the United States, it would necessarily involve an invasion of the executive department if the courts should assume such a jurisdiction. Nothing is better settled than that the courts will not interfere to restrain or control public officers in the exercise of duties of this character, either by injunction (see *Giles* v. *Harris*, 189 U. S., 475), nor by mandamus (see *Marbury* v. *Madison*, 1st Cranch, 137; *United States* v. *Raum*, 135 U. S., 200, 204; *New Orleans* v. *Payne*, 147 U. S., 261), or by writ of prohibition (see *Burch* v. *Hardwicke*, 23 Gratt., 51, 60; *Grier* v. *Taylor*, 4 McCord, 206; High on Extraordinary Remedies, Sec. 783; 2 Spelling Extraordinary Relief, Sec. 1722). See *Georgia* v. *Stanton*, 6 Wallace, 50.

The remaining questions arising upon this record are also involved in the appeal of *Wm. S. Selden and others* v. *Andrew J. Montague, Governor, and others*, pending in this court; and those questions are discussed by us in our brief, filed in that cause, and we beg leave, without repeating that discussion, to refer to what we say in that brief upon these questions.

William A. Anderson,
Attorney-General of Virginia.

Frank W. Christian,
Counsel for Defendants-in-Error.

18041

Supreme Court of United States.

SELDEN AND OTHERS

vs.

BOARD OF STATE CANVASSERS,

IN EQUITY, ON APPEAL FROM U. S. CIRCUIT COURT, EASTERN DISTRICT OF VIRGINIA.

No. 190.

JONES AND OTHERS

vs.

BOARD OF STATE CANVASSERS,

IN PROHIBITION, ERROR TO U. S. CIRCUIT COURT, EASTERN DISTRICT OF VIRGINIA.

No. 189.

REPLY BRIEF FOR APPELLEES IN FIRST CASE, AND DEFENDANTS IN ERROR IN SECOND CASE, ON THE MOTION TO DISMISS.

The first question this Court will consider is the motion to dismiss. This motion is upon the ground that there is nothing upon which a decree of injunction or writ of prohibition can now be based, even if the Court were of opinion that the complainants and petitioners would be otherwise entitled to any relief. This is manifest from the prayers for relief, which are, in substance, as follows:

(1) That the Court will determine that the Constitution, schedule and ordinance of registration referred to in the bill and in the petition are null and void;

(2) That the Court will determine that the election held for Representatives in Congress from Virginia on November 4, 1902, was therefore also null and void; and

(3) That the Court will prohibit and restrain the State Board of Canvassers from Canvassing the returns of the said election so held on November 4, 1902; and the Secretary of the Commonwealth from making out and delivering certificates of election to any of the persons who were candidates at the said election.

It is too late to give the relief stated under (3) above; for the Board of State Canvassers and the Secretary of the Commonwealth have done everything there mentioned and sought to be prohibited.

The other relief prayed and mentioned under heads (1) and (2) above could only be given by the Court as incidental to the specific relief prayed under head (3) above, and that for two reasons:

First, Because the Court has no jurisdiction or power to pass upon the validity of the said Constitution, schedule, ordinance, and election as merely abstract questions, as would be the case if it did so independently of the specific relief prayed, or after that relief can no longer be enforced; and

Second, Because the Board of State Canvassers and Secretary of the Commonwealth are not proper defendants to defend the validity of said Constitution, schedule, ordinance, and election, *except so far as their acts* are involved in or affected by those instruments and said election; and the said defendants having done all they have to do, they are not proper parties to defend the *general* validity and constitutionality of said instruments and election as abstract questions, even if the Court had power to pass upon such abstract or moot questions. If there could be such a decision *in thesi* upon the validity of said Constitu-

tion, schedule, ordinance, and election, the more appropriate defendants would be the Governor and Attorney-General. But no such power would exist in the Court, even if the suit were against the Governor (as such) and the Attorney-General, for reasons stated by this Court in *Fitts* v. *McGhee*, 172, U. S., 516, 529, 530, as well as upon other grounds that might be detailed, but need not be; *a fortiori*, no such jurisdiction will be exercised to make an abstract declaration on those subjects in these proceedings against these defendants.

The appellants and plaintiffs in error insist that the injury of which they complain is continuous, and that therefore the Court still has power to give relief in the cases. But we respectfully submit that this contention proceeds upon a misconception as to what constitutes the "injury of which they complain." The injury complained of is the apprehended action of the Board of State Canvassers and the Secretary of the Commonwealth in canvassing the returns of the election of November 4, 1902, and delivering certificates of election pursuant to such canvass. And this injury (if it be an injury) is past and accomplished. If that cause of action had been originally lacking, as for example if the bill in equity and petition in prohibition *had been filed after* the defendants had completed their action in canvassing the returns and delivering the certificates (as they have now done), it is too plain for controversy that the remaining prayers for relief seeking to have the Court make declarations that the Constitution, &c., are void, and that therefore the election of November 4, 1902, is void, would have presented no ground for the judicial action of the Court, but would have been declined as merely inviting the Court's opinion on moot or abstract questions.

And the bill and petition are in the same condition *now* as though they had been originally filed *after* the defendants had acted. It is manifest that it would be impossible now to frame an order under the bill and petition to give effect to the only specific relief prayed for.

It is doubtless true, that in some cases a Court of Equity may retain the bill after the defendant has acted, for the purpose of undoing what he has done; as in the familiar case put of a defendant continuing to construct a wall or other structure after notice of the filing of a bill of injunction to restrain the act of construction. But that principle is applicable only in cases where the undoing of what has been done is within the power of the defendant.

In the cases at bar, the acts done by the State Board of Canvassers consisted in canvassing the returns and declaring the results of the election; and the act on the part of the Secretary of Commonwealth was the delivering of certificates of election to those persons who the Board of Canvassers declared had received a majority of votes cast. And the persons to whom the certificates were so delivered have qualified under such certificates, and are now acting as members of the House of Representatives. The acts of the defendants were done by them in the discharge of their official duties under a statute of the State, and have now passed beyond the control of themselves or of the Court. No decree can be entered now undoing what has been done. The certificates of election cannot be recalled, nor can the rights of the members of the House who have taken their seats in the House of Representatives be in any way affected by any decree of the Court. No decree entered by the Court undertaking to undo what has been done (even if that result could be effected) would either benefit the plaintiffs or affect those persons who received, and have availed themselves of, the certificates of election, and are now acting under them. It can need no argument to prove that the Court will not enter a decree in the air which cannot affect the persons principally concerned, nor in any way help the plaintiffs.

The learned counsel for the appellants and plaintiffs-in-error in his brief upon the motion to dismiss suggests that the defendants are charged with being parties to a conspiracy to recognize as valid the enactments complained of in the bill and

petition, and to do a series of unlawful acts under the said enactments; and that consequently the injury to the complainants' rights is continuous. But we respectfully submit that the charge of conspiracy does not enlarge the power of the Court to pass upon merely abstract rights; and that a decree forbidding the defendants to recognize or act under the said enactments as being valid enactments, would be a decree *in thesi* merely, unless it were preliminary and incidental to specific relief in relation to particular acts apprehended by the complainants on the part of the defendants.

The same learned Counsel also contends in his brief that the Bill and Petition in these cases pray for injunctions against the defendants as to future elections. But we respectfully submit that the learned counsel is mistaken in this statement, as may be seen by reading the prayers of the Bill on pages 16 and 17 of the record, and of the petition for prohibition on page 17 of the record.

The only injunction asked against these defendants in either of those papers is, that they may be enjoined from canvassing the returns and declaring the results of the election held on November 4th, 1902, and delivering the certificates of election under that election.

If it were needful, we respectfully submit that we might go further and maintain, that if there were such prayers as the learned Counsel supposes as to future elections, such prayers would have called for the judgment of the Court in a moot case, because such a decision would be, so far as these defendants are concerned, in advance of any actual controversy between the parties.

The plaintiffs' pleadings and exhibits show, that there was a second registration under the enactments complained of in 1903, at which the complainants may have qualified themselves as voters, as they alleged in their bill and petition they were entitled to do, and at subsequent elections, therefore, they might be entitled to vote, or might actually vote: or it might be that

at such subsequent elections they would have removed from the State; or upon other grounds, and for other reasons, might not have any ground of complaint or controversy against these defendants.

This Court has repeatedly decided, that only such persons as are injuriously affected by a law can complain of its want of constitutionality, and if, therefore, any injunction had been prayed by the complainants and the petitioners in respect to future elections against the defendants to these proceedings, we respectfully submit that such a prayer would have sought the opinion of the Court in advance of an actual controversy, which opinion would be simply a declaration of future rights, and an adjudication upon a moot case. The case of *Cross* v. *DeValle*, 1 Wallace, 5, while involving different questions, throws a light upon the unwillingness of the Court to deal with such future rights before they actually arise.

We repeat, however, that it is not necessary for the Court to pass upon the question just raised, for the reason that the prayers in both the records at bar are limited to an injunction against the defendants in respect to the election held on November the 4th, 1902, and the remainder of the prayers in both cases seeks the opinion and decree of the Court upon purely abstract propositions. Accordingly, no relief within the scope of the bill and petition in these cases can now be granted by the Court.

We respectfully submit that the cases at bar are controlled by the principles settled in *Mills* v. *Green*, 159 U. S., 651. The present cases are unlike *Giles* v. *Harris*, 189 U. S., 475, because in that case the relief sought by the plaintiff was, in part, to be placed on the registration roll, which was a permanent roll, and which it was within the power of the defendants to do, and the Court to compel; and, therefore, though the particular election had been held, the Court could award the plaintiff a part of the *specific relief* prayed for, if he was entitled to it.

That case shows what is meant by the injury or cause of action

being continuous. It does not mean the mere continuance of the abstract questions on which the specific relief is based, or the continued interest of the plaintiffs' in those abstract questions, for in the nature of things such abstractions are necessarily continuous, and generally the plaintiffs' interest in them necessarily continues; but what is meant by the continuance of the injury or cause of action, is that the power of the Court to administer the *specific relief* prayed, or a part of it, still continues; and in that case the Court may continue to entertain the case.

In the present cases, no part of the specific relief prayed for remains to be accomplished, and no relief can now be given by the Court within the scope of the bill or the petition of the plaintiffs. In the case of *Mills* v. *Green*, above cited, this Court held that there was no power to pass upon moot questions after the occasion for *all the specific relief* prayed for had passed.

All of which is respectfully submitted,

WILLIAM A. ANDERSON,
Attorney-General.

FRANK W. CHRISTIAN,
for the Appellees and Defendants-in-Error.

18046

IN THE
Supreme Court of United States.

SELDEN AND OTHERS

vs.

THE BOARD OF STATE CANVASSERS, &c.

On Appeal from Circuit Court of United States for Eastern District of Virginia.

No. 190.

JONES AND OTHERS

vs.

THE BOARD OF STATE CANVASSERS, &c.

In Error to Circuit Court of United States for Eastern District of Virginia.

No. 189.

REPLY BRIEF FOR APPELLEES AND DEFENDANTS IN ERROR.

When we filed our former brief none had been filed for the appellants and plaintiffs in error, and we therefore had no opportunity of commenting upon some of the positions taken in the brief that has since been filed by Mr. Wise. We therefore now ask that we may file this brief for the purpose of commenting on some of the points and authorities relied on in Mr. Wise's brief.

In the first place, on the subject of jurisdiction, Mr. Wise undertakes to quote section 629, clause 12, of the United States Revised Statutes, but in doing so leaves out material words, which entirely changes the meaning of the statute, as will appear by the following comparison:

Clause 12th, as printed in Revised Statutes:	Clause 12th, as quoted by Mr. Wise:
"Twelfth. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States."	"Twelfth. Of all suits brought by any person * * * to enforce the right of citizens of the United States to vote in the several States." * * * * * * *

This clause is intended to give jurisdiction of suits brought for damages suffered by any person in executing the laws of the United States of the character mentioned, but not of suits to enforce the right to vote, as seems to be supposed by the learned counsel on the other side. This construction will be plain, as we said in our former brief, if reference is had to the statutes from which the language is brought forward into clause 12th.

Even read as quoted by the learned counsel, it would not support this suit, for this cannot be said to be a suit to enforce the right to vote, except in the most remote way, viz., by clogging the wheels of government under existing legislation until some other system has been adopted.

In addition to what we said in relation to section 629, clause 16, and section 1979, of the Revised Statutes, in our former brief, we will say that neither of those statutes is applicable to

the cases at bar, for the reason that none of the defendants have "subjected any citizen to the deprivation" of any rights, privileges, or immunities, as specified in 1979, nor would either the suits at bar "redress the deprivation" of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law providing for the equal right of citizens of the United States, &c. No relief given in these suits would redress the deprivation of any right, privilege, or immunity whatever.

These statutes were enacted, as this Court has said, in *Holt* vs. *Indiana Manufacturing Co.*, 176 U. S., 68, for the protection of civil rights alone, which opposing counsel seems to confound with mere political rights, such as are involved in the cases at bar. Civil rights within the meaning of the said statutes are those mentioned in Revised Statutes, sections 1977 and 1978, which citizens have, whether they are entitled to the elective franchise or not. But these rights are entirely different from political rights, which belong to those persons only upon whom the State sees fit to confer them.

THE SUITS ARE AGAINST THE STATE, AND BOTH SEEK RELIEF CONCERNING POLITICAL RIGHTS.

Opposing counsel claims that these proceedings are not against the State of Virginia, and that they are within the authority of decisions of this Court, in which it has been held that the Circuit Courts of the United States may entertain suits to enjoin the officers of a State from the performance of some act which constitutes a trespass or positive wrong to the plaintiffs, or to compel the performance of some definite and specific duty to which the plaintiff is entitled. It is evident, however, that that line of cases is entirely unlike those at bar, and that the cases at bar fall within the scope of cases, such as *Ex parte* Ayers, 123 U. S., 443, and *Fitts* vs. *McGhee*, 172 U. S., 516.

In the cases at bar, all that the defendants proposed to do, or could do, was to make a declaration, or to deliver a certificate of election. If the returns were void, it is manifest that the

declaration of the defendants of the result of those returns and the delivery of the certificate of election would also be void; and even if this were not so, certainly the mere declaration of a result or the delivery of a certificate of election does not constitute a trespass or wrong to the plaintiffs for which they could maintain an action for damages after the acts were done.

This distinguishes these cases from the case of *Osborn* vs. *Bank*, and the long line of cases which have followed the decision in that case.

The acts complained of have now been done by the Board of Canvassers and the Secretary of the Commonwealth, and yet we respectfully submit that it would surpass the ingenuity of the counsel of the complainants to frame an action at law in behalf of the plaintiffs against the defendants in these cases to recover damages for those acts.

It is manifest that these suits were not brought for the purpose of preventing tortious or wrongful acts, as in *Osborn* vs. *The Bank*, and other cases of that class, but were brought by the plaintiffs for the purpose of supervising, controlling, and directing State officers in the discharge of political duties, and as incidental thereto to have the Court declare the abstract propositions that the Constitution of Virginia and the ordinance of registration are void.

The effect of such a decision would not be to redress the wrongs complained of by the plaintiffs, but to stop the wheels of government so far as the election of representatives in Congress is concerned, by preventing all future elections under the existing law; and thus, by a kind of compulsion, to force the State to adopt some other system for the election of members of the House of Representatives.

As was said by Mr. Justice Harlan in delivering the opinion of this court in *Fitts* vs. *McGhee*, 172 U. S., none of the defendants in this case was charged with the duty of carrying out the provisions of the Constitution and ordinance of registration complained of. The duties of the defendants in these cases was to execute a law which had been upon the statute books for a number of years before the adoption of the new Constitution.

and the validity and constitutionality of that law are in no way impugned by the plaintiffs. And the only way in which the laws which are complained of enter into the office of the defendants is, that the defendants canvass returns made at the prior election, declare their result, and one of the defendants delivers certificates of election in accordance with such declaration. And because the defendants are in this remots way connected with the prior steps in the election proceedings, the plaintiffs seek by a decree against them (who are not carrying out or enforcing the particular laws complained of) to have the constitutionality of those laws determined.

What was said by Mr. Justice Harlan, delivering this Court's opinion in the case of *Fitts* vs. *McGhee*, 172 U. S., 530, can be more strongly said in these cases:

"That would be a very convenient way for obtaining the speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

We, therefore, respectfully insist, that upon the principles settled in *Cunningham* vs. *Railroad Co.*, 109 U. S., 446; *Ex parte* Ayers, 123 U. S., 443, and *Fitts* vs. *McGhee*, 172 U. S., 516, these cases are against the State of Virginia, and on that account cannot be maintained.

What we have already said demonstrates that the relief sought in both cases is political. The fact that, if the acts of the defendants sought to be prohibited are performed, they furnish no ground of action for damages against the defendants, as would be the case if the defendants committed a trespass or positive wrong upon the plaintiffs, makes it manifest that the relief sought is purely political, for it is plain that if the plaintiffs had private and distinct rights, as to which they were seeking redress, any act in violation of those rights would give them a good cause of action for damages. If the relief sought in these cases were granted it would merely, so far as the relief relates to any definite acts of the defendants, have the effect of

preventing the operations of government, certainly so far as representation of the State of Virginia in the House of Representatives is concerned, the object of the plaintiffs being that by thus preventing representation, a compulsion will be brought to bear which will force a change of laws as to registration and the elective franchise. Such relief as this is plainly merely political.

If the Court were to grant such relief it would merely pull down one system without any ability to reinstate another. It would enjoin a branch of the executive and political departments from executing its duties, without being able to substitute any other system, or any other action in the place of that which it negatived and destroyed.

The learned counsel on the other side seems to think it anomalous that the courts should decline to enforce such relief entailing such consequences, but we confidently submit, not only that this Court has invariably declared that the courts were not competent to administer such relief, but that the learned counsel cannot produce a decision of any court of high repute, or any statute of the United States, that justifies the Court in entertaining such proceedings. Certainly none of the acts of Congress to which he refers lend the least color to supporting any such jurisdiction, notwithstanding the confidence with which he seems to rely upon them, and this Court has uniformly decided that there was no such jurisdiction.

It necessarily follows, from what we have said above, that in these cases neither a bill in equity nor a writ of prohibition will lie. It is unnecessary for us to add anything to what we have said in our former brief on the subject of the bill in equity.

On the prohibition proceeding we wish to make some additional comments in reply to what opposing counsel has said in his brief touching that proceeding.

PROHIBITION WILL NOT LIE IN THIS CASE BECAUSE—

(1) UNITED STATES CIRCUIT COURTS HAVE NO JURISDICTION OF PROHIBITION IN ORIGINAL PROCEEDINGS.

and

(2) BECAUSE THAT WRIT ONLY LIES BETWEEN COURTS.

(1) United States Circuit Courts have no jurisdiction to award a writ of prohibition, except in aid of a jurisdiction already acquired.

It cannot be necessary that we should add anything to the authorities cited in our former brief, which support this position beyond the reach of cavil.

This Court has announced, not once, but repeatedly, from the case of *McIntyre* vs. *Wood*, 7 Cranch, 504, up to *Smith* vs. *Bourbon Co.*, 127 U. S., 112, that the writ of mandamus (and the writ of prohibition stands upon exactly the same footing) can be issued by United States Circuit Courts only under section 716 of the Revised Statutes, embodying, with a slight change, section 14 of the Judiciary Act, and that the language of section 716, which gives the jurisdiction to issue such writs, limits and confines their use to cases where they are necessary in aid of a jurisdiction already acquired.

When the statutes which the learned counsel on the other side relies on as supporting the power of the Circuit Court to issue the writ as an original proceeding were passed, these decisions had been made, and even if those statutes were otherwise applicable to the enforcement of political rights, it is plain they would not be held, in the absence of express words, to change the well-settled construction which had been placed upon section 716 by the Supreme Court of the United States.

In this connection, we beg to call attention to an erroneous statement on page 81 of the brief, attributing to the Honorable Chief Justice, on the trial in the lower court, suggestions which we do not remember to have been made. We do not think the Honorable Chief Justice suggested that the 12th or 16th clause of section 629 had been repealed by the general act of August 13, 1888; on the contrary, it is our recollection that he assumed that those clauses were in force, but did not think them applicable to these cases; and certainly no such suggestion was made in relation to section 722 of the United States Revised Statutes. According to our very distinct recollection, that section was not referred to until after the argument in the lower

court was over, it being first referred to in the assignment of errors made by opposing counsel.

(2) In our former brief we cited authorities in support of the proposition that the writ of prohibition lies only between courts. Precedents in Virginia to this effect are many and uniform. See *Burch* vs. *Hardwicke*, 23 Grattan, 51, and a long line of cases cited in a note to *Hogan* vs. *Guigon*, 29 Grattan, 713.

The Supreme Court of the United States had occasion to pass upon the same question in *Smith* vs. *Whitney*, 116 U. S., 167, and held the same way, deciding that if the Supreme Court of the District of Columbia had jurisdiction to issue a writ of prohibition in any case it could not do so to prohibit the Secretary of Navy from ordering a court-martial. (116 U. S., 167, 176.) This Court said, on page 176:

"The object of a writ of prohibition is to prevent a court of peculiar, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance. It can only be issued to restrain the exercise of judicial functions. When the suit complained of is brought by a private person, he may be joined as a defendant. But when it is a suit or prosecution on behalf of the government, the writ of prohibition can go to the Court only.

"The Secretary of the Navy being an executive officer, and not a member of the court martial sought to be prohibited, it is quite clear that his acts concerning the petitioner cannot be the subject of a writ of prohibition. * * *

"A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction."

These decisions in Virginia and in the Supreme Court of the United States conclude the question as to the office of such a writ, even if other States, by reason of statutes or their practice, announced and adhered to a different rule. But in point of

fact, we believe the decisions are wellnigh unanimous to the same effect in other jurisdictions.

The learned opposing counsel cites some cases in respect to railway commissioners in England. If the statutes under which those commissioners act are examined, it will be seen that their duties are substantially the duties of a court; indeed, the jurisdiction was originally conferred upon the Court of Common Pleas by statute, and subsequently transferred to the body known as railway commissioners.

The learned opposing counsel cites the case of *Brazie* vs. *Fayette County Commissioners*, 25 West Va., 213, in support of his contention that a prohibition is not limited to a court. In that case, election commissioners were proceeding to examine witnesses and take evidence to show that the returns of election before them were not proper to be counted; and it was held that the sole duty of the commissioners of election was to count the returns sent to them, and not to take evidence and to decide which of those returns ought, or ought not, to be counted, and that therefore a prohibition was issued against their assuming judicial functions, when, in point of law, no such judicial functions were imposed upon the board. The prohibition was not to prevent their acting at all, but to prevent their acting in the character of a court when they had no jurisdiction so to act.

Whether this case be soundly decided or not, it does not concern us in this case; for if soundly decided, it in no way militates against our contention.

Opposing counsel also cites some cases from South Carolina, in which State the courts have gone further than in any other to sustain the writ of prohibition where the writ is not directed to what is strictly a court; but the Carolina court based its ruling upon the ground that the proceedings in the particular case were judicial in their nature; and it did not undertake to apply the writ except to a body exercising judicial functions.

The learned opposing counsel, on pages 83 to 87 of his brief, has cited from the American and English Encyclopedia of Law, volume 19 (old edition); from Spelling on Injunctions and other Extraordinary Remedies, and from High on Extraordi-

nary Legal Remedies, general expressions on the subject of the use of the writ of prohibition. We have attempted to verify these citations, but in nearly every instance have either been unable to find the language quoted at all, or have found that the language used by the author has, by some error, been so changed as to materially change the sense.

On page 84 of his brief, he quotes two paragraphs from volume 19 of the old edition of the American and English Encyclopedia of Law at page 275, which we have not been able to find in the precise form quoted.

On page 85 of his brief, he quotes 2nd Spelling on Injunctions and Other Extraordinary Remedies, section 1744; but the quotation stops in the middle of a sentence and materially changes the author's meeting.

Sentence as quoted in brief:	Sentence as it appears in Spelling:
"On a similar principle, such writ will lie from the judge to the county commissioners assembled in special session to ascertain the result of an election to prevent them from transcending their powers."	"On a similar principle, such writ will lie from the judge to the county commissioners assembled in special session to ascertain the result of an election to prevent them from transcending their powers by examining witnesses and hearing evidence to determine whether the precinct commissioners have returned votes which ought not to be counted."

This passage is taken from the case of *Brazie* vs. *Fayette County Commissioners*, 26 West Va., 213, in which the Court held that prohibition would lie to a board of county commissioners, although it was merely a ministerial body, if it undertook to exercise judicial powers. In other words, that prohibition would not only lie to a court to prevent it from exceeding

its jurisdiction, but would also lie to a ministerial body which undertook to act as a court without lawful power to do so.

On page 85, the brief undertakes to quote from section 1720 of 2nd Spelling, but the quotation is erroneous.

Passage as quoted in brief:

"It is no defence to the writ that the act sought to be prohibited is ministerial merely, if the party prohibited is part of the machinery of the obnoxious law and the instrument in the attempt to make its prohibitions effectual when it is void."

Passage as it appears in 2nd Spelling, Sec. 1720:

"In such case, it is no defence that the act sought to be prohibited is ministerial only, since the officer is part of the machinery of the court and its instrument in the attempt to enforce a judgment entered by it without jurisdiction."

In other words, this passage from Spelling announces the doctrine that while a ministerial act can generally not be the subject of a prohibition for lack of jurisdiction, if an execution has issued upon a judgment which is void, the execution may be prohibited because it is a part of the judgment.

On page 87 of the brief, there is a quotation from 2nd Spelling, section 1718, which omits the word "only", making a material change in the sense. This section from Spelling expressly lays down the doctrine that the writ of prohibition will only lie to judicial bodies.

On page 85 of the brief, there is an incorrect quotation from Bailey on Jurisdiction, section 446.

Quotation as it appears in the brief:

"The writ lies where, although the body prohibited may have jurisdiction of the subject, some question arises which is not within the power of the BODY to decide."

Language as it is in 2nd Bailey, Sec. 446:

"The writ lies only where the subordinate tribunal has no jurisdiction at all in the premises, or where, having jurisdiction, some question arises which is not within the power of the COURT to decide."

On page 85 of his brief, the learned counsel misconceives, and incorrectly states, the true effect and meaning of section 452 of 2nd Bailey on Jurisdiction. This author repeatedly lays down the doctrine that the writ can only be used to prohibit judicial action. See 2nd Bailey on Jurisdiction, Sec. 449, *et seq.*

The citations made by the learned counsel from High on Extraordinary Remedies do not follow the language used by that author:

Language used in brief on page 86:

"It is a proceeding wholly collateral to the original proceeding assailed, intended to arrest that proceeding and prevent its further prosecution by a court *or a board or a person* having no jurisdiction of the subject matter in dispute.

"It is the means by which a superior exercises its lawful jurisdiction to restrain an inferior, keep it within the bounds of its jurisdiction. It is a civil proceeding to prevent the further exercise of an unwarranted jurisdiction."

Language used in High, page 715:

"So far from this, it is regarded as wholly collateral to the original proceedings, being intended to arrest that proceeding and to prevent its further prosecution BY A COURT having no jurisdiction of the subject matter in dispute.

"In other words, it is substantially a proceeding between TWO COURTS, a superior and an inferior, and is the means by which the superior tribunal exercises its superintendence over the inferior and keeps it within the limits of its rightful jurisdiction."

On page 87 of the brief, the quotation differs from the language used in section 779 of High.

Language in the brief:	Language used in High, Sec. 779:
"The governing principle in such cases is, that when an inferior *tribunal* proceeds in excess of its lawful jurisdiction, it is chargeable," etc.	"The governing principle in such cases is, that where an inferior COURT proceeds in excess of its lawful jurisdiction, it is chargeable," etc.

On page 87 of the brief, the language used differs from that in section 781 of the 2nd edition of High.

Language used in brief:	Language used in High, Sec. 781:
"The province of the writ is not necessarily confined to cases where the inferior is absolutely devoid of jurisdiction. It extends to cases where the inferior, although rightly entertaining jurisdiction of the subject matter in controversy, exceeds its legitimate powers."	"The province of the writ is not necessarily confined to cases where the subordinate COURT is absolutely devoid of jurisdiction, but it is also extended to cases where such tribunal, although rightly entertaining jurisdiction of the subject matter in controversy, has exceeded its legitimate powers."

We do not, of course, intimate that the learned counsel has purposely misrepresented these authorities, but we do think that there has been a lack of care in quoting from them, and that such material errors appear in the citations of the brief as to justify us in asking the Court to verify them.

We respectfully submit that the well-established doctrine under the Virginia cases, and the case decided by the Supreme Court of the United States, already cited, is that prohibition can only be used between courts. We also submit, that this is the weight of authority in the other States in this Union, and that the only departure from this doctrine in any State has been

to extend the writ to bodies exercising judicial and discretionary duties, although not strictly a court, and in West Virginia to a body which undertakes to exercise judicial functions where it has no power to do so.

All the authorities concur in holding that the writ of prohibition will not lie in a case like the one at bar, where the defendants are clothed merely with ministerial functions, to prevent their performing such ministerial functions.

The learned opposing counsel, on pages 90 to 93, cites a number of cases from Virginia to show that a writ of mandamus has been used repeatedly in Virginia to compel the performance of ministerial acts, from which he seemingly argues, that a writ of prohibition may be used to prohibit acts of the same character.

None of the cases cited from Virginia by the learned counsel are cases of prohibition, but are cases of mandamus. It is plain that those cases have no relevancy whatever to the case at bar.

A writ of mandamus is always used, and can only be used, to enforce the performance of a clear definite ministerial duty concerning which there is no discretion. On the other hand, a writ of prohibition can be used, and is used, only to prevent a court (or possibly in some jurisdictions a body which, although not strictly a court, exercises judicial functions) from exceeding its jurisdiction.

The one writ is appropriate only where the defendant is exercising ministerial duties, and the other writ is appropriate only in the case of a defendant exercising judicial or discretionary duties.

THE WORK OF THE VIRGINIA CONVENTION WAS NOT VOID BECAUSE ITS MEMBERS DID NOT TAKE AN OATH.

It cannot be necessary that we should add to what has already been said in our former brief on this point. There was some division of opinion in the convention upon the question of the propriety of the members taking the oath; but it was decided,

by a majority, that the oath was not only not necessary, but was not proper.

We respectfully submit, that the members of the convention were not officers within the meaning of the Constitution of 1869 as adopted; and that in addition to this it would have been incongruous and inappropriate that members of a convention assembled for the purpose of amending and altering an existing Constitution should take an oath to support the Constitution which they propose to change. This was, in substance, the argument that convinced the majority of the convention that the oath was neither necessary nor proper; and we respectfully submit that the argument is a sound one.

But whether this be correct or not, it is manifest that the failure to take the oath could not affect the validity of their acts. The cases cited by the learned counsel on the other side in no way impugn this principle. Although the failure to take the oath may vacate an office, it has never been held, so far as we are aware, either in the State of Virginia or elsewhere, that such failure will make void the acts of a *de facto* officer holding his office under color.

In addition to this, the Constitution and ordinance of registration have been recognized by all the departments of Virginia as valid, and they have been decided by the Supreme Court of the State to be valid; and neither this Court, nor the lower court, would undertake to declare the Constitution and laws of the State to be void when they were so recognized by the State itself, except upon some ground rendering particular provisions of the Constitution or law invalid by reason of repugnancy to some provision of the Federal Constitution. A Constitution so recognized will certainly not be held invalid because of the failure of the members of the convention to take an oath, even if the taking of such oath was proper. See *Leeper* vs. *Texas*, 139 U. S., 462; *in re* Duncan Id. 449.

The decisions referred to by the learned counsel on the other side as to what constitutes an officer and an office, and what has been considered by the Virginia courts to be the effect of failure to take an oath in vacating an office, have no bearing upon any

question now before the Court, and need no examination at our hands.

Opposing counsel in his brief contends that the registration ordinance and appointment of registrars by the convention were null and void, upon the ground that the convention had no power of independent legislation. We respectfully submit, that neither the court below, nor this Court, has authority to go behind the recognition and determination of the different departments of State government as to what constitutes the law of the State, except upon an allegation that such law is in conflict with some provision of the Constitution of the United States; and this consideration, if there were no other, would deprive the contention of opposing counsel of any legal force. See, *in re* Duncan, 139 U. S., 449; *Leeper* vs. *Texas*, 139 U. S., 452.

In point of fact, however, the acts of the convention in this regard did not constitute independent legislation. On the contrary, the ordinance of registration and appointment of registrars were referred to in the Constitution itself, were necessary for the purpose of putting it in operation by its terms, and formed a necessary part of it.

THE SO-CALLED FUNDAMENTAL CONDITIONS SET FORTH IN THE ACT OF CONGRESS OF JANUARY THE 26, 1870, ADMITTING THE STATE OF VIRGINIA TO REPRESENTATION IN CONGRESS WERE BEYOND THE POWER OF CONGRESS, WERE NEVER ASSENTED TO BY VIRGINIA, AND HAVE ALWAYS BEEN NULL AND VOID.

When we filed our former brief in these cases, we had very little to say upon this point, because we did not believe that opposing counsel would seriously contend that the fundamental conditions in question were binding upon Virginia; but as opposing counsel has devoted so much space in his brief to the discussion of those conditions, and has made several incorrect statements in connection therewith, we think it proper that we should add some further comments upon this subject. We have not the time nor space to go into the matter exhaustively,

but we do not think it necessary that we should do so, for the reason that the question is a settled question in this Court, and because we feel confident that this Court will not find it necessary to pass upon the question at all in these proceedings.

It was not deemed necessary to admit Virginia into the Union; for she was never beyond its pale. The act of January 26,1870, did not ~~suppose~~ purport to do so, but only to admit her again to her constitutional right of representation in the Congress. And it was in that act the conditions in question were inserted.

In the first place, let us see what were the fundamental conditions set forth in said act of January the 26, 1870. They are as follows:

. .

"And provided, further, that the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions:

"First. That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State, provided that any alteration of said Constitution prospective in its effects may be made in regard to the time and place of residence of voters.

"Second. It shall never be lawful for said State to deprive any citizen of the United States, on account of his race, color or previous condition of servitude, of the right to hold office under the Constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens.

"Third. That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the Constitution of said State."

The Congress had in the former year (1869) passed an act prescribing what Virginia should do in order to be entitled to admission to representation in the Senate and House of Representatives. Virginia had, in accordance with the terms of that act, adopted a Constitution, ratified the 14th and 15th Amendments to the Federal Constitution, elected her State officials and Legislature and United States Senators, and members of the House of Representatives, and the Virginia Legislature had thereupon adjourned until the Constitution which had been adopted should be approved by Congress, which the act of 1869 had provided for.

When the act for her admission to representation in Congress was introduced into the House of Representatives conditions which were substantially the same as the conditions above set forth were proposed, but the House of Representatives, ~~by a large majority,~~ voted down all the said conditions, and passed the act to admit Virginia without any conditions. See Congressional Globe, 1869-70, p. 503.)

When the bill went to the Senate the fundamental conditions above set forth were added to the bill. (See Congressional Globe, 1869-70, p. 643.) The said conditions were added by three different votes, which stood 31 to 28, 30 to 29, and 31 to 29. The majority in favor of imposing the conditions embraced eleven Senators from the lately reconstructed Southern States.

It thus appears that a ~~large~~ majority of the Senators from Northern and Western States were opposed to the imposition of such conditions.

When the bill in its amended form went back to the House of Representatives there was very little debate, but the debate that was had demonstrates that the conditions were accepted by the House because it was believed that the conditions were void and of no binding force upon Virginia, and because, if they were not accepted, the admission of Virginia to representation would be indefinitely delayed. (See Congressional Globe, 1869-70, pp. 716-720.)

Opposing counsel quotes at length in his brief from speeches of members of the House and Senate when this bill was under

consideration. We will not imitate his example, but if such speeches could be regarded as authority in this Court, we respectfully submit that the weight of the reasoning, as well as the repute and standing as lawyers, is decidedly on the side of the members of the House and Senate who opposed the validity of the so-called fundamental conditions. Many of the ablest Senators and members of the House who participated in the debate expressed the opinion that the said conditions were beyond the power of Congress, and would be absolutely void.

Most of the instances referred to by opposing counsel of supposed conditions being imposed upon new States admitted into the Union were discussed, and were shown to be either such conditions as would exist under the Federal Constitution, independently of any declaration of Congress on the subject, or were based upon the peculiar conditions such as deed of cession by Virginia of the Northwestern Territory and the ordinance for the government of that territory, and cases of that nature, which depended upon peculiar conditions, not applicable to the case of the Southern States.

It is, however, needless that we should concern ourselves with what was thought of the question by the legislative branch of the government; for such precedents (rarely ever very strong) can have no force as against the repeated decisions and declarations of this Court upon the subject. Opposing counsel, in his brief, cites a number of States which he claims have been subjected to unequal conditions. But none of these cases have stood the test of approval by this Court. Each of those cases would have to be separately examined and determined before it could be relied on as a precedent. And there is neither time nor space here for such examination, and if there were, it would not be profitable. The same enquiry which would be requisite in each of the cases referred to may be more usefully directed to the particular case in hand.

The learned opposing counsel in his brief states that Virginia expressly accepted these fundamental conditions. We respectfully submit that this statement is absolutely groundless. If Virginia did accept the conditions, it is plain she must have

done so by some public act, and we unhesitatingly affirm that there is no such act in question on the part of the State of Virginia; and that she never, either expressly or impliedly, accepted the conditions any further than that her representatives took their seats in Congress after the passage of the Act of Congress in question.

We must suppose that opposing counsel bases this statement upon the speech of Mr. Farnsworth, referred to by him on page 402 of the Congressional Globe of 1869-70, to the effect that the Speaker of the Virginia House of Delegates, at the head of a Legislative Committee, had appeared before the Reconstruction Committee and pledged the faith of Virginia—Mr. Wise says to "keep faith and to carry out every provision," leaving it to be inferred that the pledge was to carry out every provision of the fundamental conditions; whereas the language used by Mr. Farnsworth was to "keep faith and to carry out every provision of *that Constitution*"; quite a different thing.

At that time the Constitution of 1869 had been adopted, but the fundamental conditions had not been passed, and there never was any pledge that Virginia would observe them. There is no evidence that the said committee had any authority to pledge Virginia at all; and no pledge that could be made by them to carry out every provision of the Constitution of 1869 could be more binding than the Constitution itself, which had already been adopted by the people of the State. Indeed, so far from Virginia accepting said "fundamental conditions," immediately after their passage, on the 8th day of February, 1870, the Governor of Virginia sent a message to the Virginia Legislature, in which he used this language: "Notwithstanding 'fundamental conditions' as futile as unnecessary, you are the legislature of a State co-equal in all her rights and prerogatives with any and every other State of the American Union."

An examination of the so-called fundamental conditions will show that they deal with matters which, under the Constitution of the United States, are made the subject of domestic regulation by the States themselves, viz.: the right to vote, the right

to hold office, and the right to legislate concerning public education.

An examination of those fundamental conditions will not only show this, but it will show more than this—viz.: that those fundamental conditions undertake, not only to prescribe what regulations shall prevail as to those purely domestic matters, but in addition to say that the State of Virginia shall at no time in the future make any change in the regulations then established on those subjects, no matter how much such changes may be demanded by the future needs and exigencies of society in the State. Conditions of a similar character were undertaken to be imposed by Congress upon the other Southern States. It would be strange, indeed, if it were possible that Congress could have power thus to emasculate the sovereignty of the States of the Union.

The provision on the subject in the Federal Constitution, which confers upon Congress any power to act at all in the matter, is contained in the fourth clause of the fourth article, declaring:

"The United States shall guarantee to every State in this Union a republican form of government."

In carrying out this article, it may be admitted that Congress has a large discretion as to the choice of methods, and may adopt any method that is necessary and appropriate.

But we respectfully submit, that a condition which makes the regulations, established at any given time by a State unalterable, so far from being a necessary and appropriate means of guaranteeing a republican form of government, is opposed to one of the fundamental principles of republican government, and to the fundamental needs of society. If the State of Virginia should seek to place such an irrevocable and unalterable provision in its own Constitution, it would of course be absolutely futile.

George Mason, who was esteemed a pretty good republican in his day, in framing the Bill of Rights in Virginia, declared:

"When any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."

It may further be remarked, that if Congress has power to impose fundamental conditions, such as were attempted to be imposed upon Virginia, that power is without any limits except the will of Congress itself; and under such a power, Congress might absorb all those subjects of domestic legislation which the Federal Constituton has left to the States and denied to the Federal Government. The language of the provision is:

"Shall guarantee to every State in this Union a republican form of government."

What is a State, and what is the Union referred to in the Constitution? The answer is obvious. The State is not defined, but when the Constitution used that term, it evidently meant a political community of the character of the thirteen States which united in framing the Constitution, enjoying the powers and subject to the control of the Federal Government in the manner and to the extent pointed out in the Constitution itself. And it is equally clear by the term "union" was meant the union of States of that nature equal in sovereignty among themselves. In other words, a union between equal States and not between States of unequal power and sovereignty.

When the Constitution, therefore, provides that the United States shall guarantee to each State a republican form of government, it would be plainly contrary to its necessary meaning to suppose that Congress, in the exercise of that power, could alter the nature of the States referred to and of the Union referred to, by emasculating the sovereignty of the State to which the power was applied, and by destroying the integrity of the Union of equal States, which the Constitution evidently contemplated.

The same reasoning which would support the power of Congress to impose such fundamental conditions would equally support its power to change the representation of the State in the House of Representatives and the Senate of the United States. Either class of conditions would be invalid for the plain reason that they would be opposed not only to the whole plan of the Federal Constitution, but also to its express mandates. The Federal Constitution contemplated the continued existence of the States; and when we use the word "State," that word must be taken in the sense in which it was used in the Constitution itself, viz.: a political community possessing all the powers not granted in the Federal Constitution to the Federal Government or denied by that instrument to the States. As was said by this Court in *Texas* vs. *White*, 7 Wallace, 725:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

And it is plain that when the word "State" is used, it means a political community in all of its elements of sovereignty and power, as contemplated by the Constitution, not a mangled and hampered body politic shorn of its essential powers and dignity, and deprived of its sovereign power to legislate upon those subjects which are left by the Federal Constitution within the sphere of its control.

This Court further said in the Slaughter-House cases, 16 Wallace, 82:

"Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and

of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the State and to confer additional power on that of the nation."

The Court in the case just cited refers to the adoption of the post-bellum amendments to the Federal Constitution; but none of those amendments extend the Federal power over the subjects attempted to be embraced within the fundamental conditions embraced in the Act of Congress of January the 26th, 1870. We suppose no one will doubt or deny that the matters embraced within those fundamental conditions are purely matters of domestic concern, and that they are within the exclusive control of the States, and are beyond the power or control of the Federal Government.

If this is so, they are plainly, by the express mandate of the Constitution, reserved to the States by the 10th amendment to the Federal Constitution, which declares:

"The powers not delegated to United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The contention of opposing counsel that Congress had power to enact these fundamental conditions so as to make them binding upon the State of Virginia, necessarily attributes to Congress the power to violate the Constitution of the United States, and by its act to impose upon the Southern States restrictions or conditions which could only have been imposed upon all the States by a constitutional amendment. The mere statement of this proposition, we submit, furnishes its own answer. It is an axiom, not admitting of question, that the powers of Congress on every subject find their limitations in a lack of granted power, and much more in the express prohibitions of the Constitution where they are applicable.

If another view be taken, that the admission to representation was subject to the conditions imposed, and upon their

breach the State might be deprived of representation in Congress, it may be said that if so abhorrent a suggestion is admissible at all, it has no place in this forum, but must be addressed to the legislative departments of the Federal Government. Upon the main question, this Court has repeatedly declared its views in no uncertain terms.

In *Pollard* v. *Hagan*, 3 Howard, 212, 223, this Court said:

"When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted."

The Court further said:

"The right of Alabama and every other new State to exercise all the powers of government which belong to and may be exercised by the original States of the Union must be admitted, and remain unquestioned, except so far as they are temporarily deprived of control over the public lands."

The Court further said:

"Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within the limits ,subject to the

common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the Constitution, laws, and compact, to the contrary notwithstanding."

The Court further said:

"The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, 'that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State,' would be void if inconsistent with the Constitution of the United States."

In *Escanaba Co.* v. *Chicago,* 107 U. S., 678, at page 688, this Court said:

"And although the act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a Constitution and State government, and the resolution of Congress of Dec. 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is "on an equal footing with the original States *in all respects whatever.*" 3 Stat. 536. Equality of constitutional right and power is the

condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek and Pennsylvania over the Schuylkill River. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Permoli* v. *First Municipality,* id. 589; *Strader* v. *Graham,* 10 id. 82."

In *Ward* v. *Race Horse,* 163 U. S. 504, this Court examined and reaffirmed the former cases decided by this Court on this subject. *Pollard* v. *Hagan,* 3 How. 212; *Withers* v. *Buckley,* 20 How. 84; *Escanaba Company* v. *Chicago,* 107 U. S. 678; *Cardwell* v. *American Bridge Co.,* 113 U. S. 205 and *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1. The Court cited with approval what was said in *Withers* v. *Buckley,* 20 How. 84, to the following effect:

"In considering this Act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfact equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this Court in the case of *Pollard's Lessee* v. *Hagan,* 3 How. 223."

In the case of *Bolln* v. *Nebraska,* 176 U. S., 83, this Court referred to the case of *Brittle* v. *The People,* 2 Nebraska, 198, on which the opposing counsel relies; and thus the very position for which opposing counsel contends was brought to the attention of this Court. With the question necessarily brought to its attention this Court reiterated its former views:

"But this Court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such Territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States, and, in the language of the act of 1867 admitting the State of Nebraska, it stands 'upon an equal footing with the original States in all respects whatsoever.' "

In the same case, this Court further said:

"This Court has also repeatedly held that the first eight amendments to the Constitution applied only to the Federal Courts, and it certainly could never have been intended that these amendments should be imposed upon Nebraska, and thereby a hard and fast rule made for that State that would forever preclude amendments inconsistent with the bill of rights of the Federal Constitution, and which this Court has held to be applicable only to Federal Courts. As we have repeatedly held, the Fourteenth Amendment was not intended to curtail the powers of the State to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life. It may be readily supposed that the inhabitants of each State understand perfectly their own local needs and interests, and, with the facilities with which the Constitutions of the several States may be amended, it is scarcely possible that any evil which might be occasioned by an improvident amendment would not be readily redressed. Not only did Congress in the act of 1867 declare Nebraska was admitted upon an equal footing with the original States, but the whole Federal system is based upon the fundamental principle of the equality of the States under the Constitution. The idea that one State is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the

Constitution, that it cannot be entertained even if Congress had power to make such discrimination. We are, therefore, of opinion that the provision of the Constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States."

We respectfully submit, that these decisions of this Court put this question as rest.

In conclusion, we wish to add a word of comment upon the bitter attack made in the brief of opposing counsel upon Virginia and her representatives. We cannot characterize as they deserve to be the intemperate charges made by opposing counsel upon the members of the Constitutional Convention of Virginia who voted to ordain the Constitution, upon the members of her Legislature, and upon all of her Executive and Judicial officers. The individuals who filled those positions and who are assailed with undiscriminating bitterness embrace men worthy of Virginia in her best days, and they enjoy and deserve the confidence and esteem of their fellow-citizens in the highest degree. We will only say that the imputations against them are groundless and unjust.

W. A. ANDERSON,
Atty.-General of Virginia.

FRANK W. CHRISTIAN,
Counsel for Appellees and Defts. in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.
No. 190.

WILLIAM S. SELDEN, WILLIAM H. ANDERSON, AND CLARENCE B. GILPIN, Appellants,

vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA; DAVID Q. EGGLESTON, SECRETARY OF THE COMMONWEALTH OF VIRGINIA; MORTON MARYE, AUDITOR OF PUBLIC ACCOUNTS OF VIRGINIA, AND OTHERS, Appellees.

On Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

Motion to Dismiss Appeal, or to Affirm Decree of the Lower Court.

Now come the appellees, by their counsel, and move the Court to dismiss the appeal in the above- entitled cause, upon the ground that there is now no actual controversy involving real and substantial rights between the parties to the record, and no subject matter upon which the judgment of this court can operate; or to affirm the judgment of the Circuit Court of the United States for the Eastern District of Virginia in this cause, on the ground that although the record shows that this court has jurisdiction, the questions on which the jurisdiction depends are so frivolous as not to need further argument.

William A. Anderson
Frank W. Christian
Counsel for Appellees

NOTICE OF MOTION TO DISMISS OR AFFIRM.

To ~~Messrs.~~ John S. Wise, Esq.,

Counsel for the Appellants:

Please take notice, that on Monday, the 29th day of February, 1904, at the opening of the Court, or as soon thereafter as counsel can be heard, the above motion to dismiss the appeal, or to affirm the decree of the lower court, will be submitted to the Supreme Court of the United States at Washington, in the District of Columbia, for the decision of said court thereon.

Annexed hereto is a copy of the brief of argument, which will be submitted with said motion in support thereof.

William A. Anderson
Frank W. Christian
Counsel for Appellees.

BRIEF FOR THE APPELLEES IN SUPPORT OF MOTION TO DISMISS.

The motion to dismiss this appeal is founded upon the fact that the acts sought to be enjoined have been performed by the defendants, and that nothing remains to be done upon which any decree of the court can operate. The lower court refused the injunction prayed for and dismissed the plaintiff's bill; and, thereupon the defendants, constituting the Board of State Canvassers, met, canvassed the returns, and the defendant, the Secretary of the Commonwealth, delivered writs of election to the persons who had been elected members of the House of Representatives at the election held on Novembr the 4th, 1902.

One of the persons voted for at said election was the Honorable Carter Glass, who was elected to fill an unexpired term in the 57th Congress. He and nine others were also elected for full terms in the 58th Congress. The Honorable Carter Glass appeared and was admitted to his seat in the House of Representatives in December, 1902, for the unexpired term, and he and all the other representatives from Virginia appeared and were admitted to representation in the 58th Congress.

Of these facts, the court may take judicial cognizance. This being so, there is nothing remaining to be done upon which the decree of the court can operate in this cause.

Opposing counsel contend, that the court may still entertain jurisdiction of this case and decide the questions raised by the bill, for the reason that the bill avers the election of November the 4th, 1902, to have been null and void, and asks for a declaration of the court upon that question, which will involve the future rights of the plaintiffs. But it is a complete answer to this suggestion to say that any declaration by the court touching the validity or invalidity of the election held in November, 1902, or touching the validity or invalidity of the Constitution and ordinance of registration of the State of Virginia, or touching the future right of the complainants to register or to vote, would constitute a decree upon a purely moot or abstract question, which this court will not undertake to do.

See *Mills* vs. *Green*, 159 U. S., 651, and the cases cited there; *Codlin* vs. *Kohlhausen*, 181 U. S., 151; *Tennessee* vs. *Condon*, 189 U. S., 64.

WILLIAM A. ANDERSON,
Attorney-General of Virginia.

FRANK W. CHRISTIAN,
Counsel for the Appellees.

State of Virginia,
City of Richmond, to-wit:

I, David Q. Eggleston, being duly sworn, do hereby state as follows:

I was, in the year 1902, Secretary of the Commonwealth of Virginia, and as such a member of the Board of State Canvassers of Virginia. After the Circuit Court of the United States for the Eastern District of Virginia rendered its judgment and decree dismissing the petition for a writ of prohibition and the bill praying for an injunction in the two causes of "William H. Jones and others against Andrew J. Montague, Governor of Virginia, and others," and "William S. Selden and others against Andrew J. Montague, Governor of Virginia, and others," to-wit, on the 29th day of November, 1902, the said Board of State Canvassers of Virginia convened at the office of the Secretary of the Commonwealth of Virginia, and, in accordance with the law of the State of Virginia in such cases, proceeded, upon the certified abstracts on file in the office of the Secretary of the Commonwealth, to examine and make statements of the whole number of votes given at the election held on November 4th, 1902, for representatives in Congress; which statements showed the names of persons to whom votes had been given at said election for said offices, and the whole number given to each, distinguishing the several districts, cities and counties in which they were given; and the said board certified such statements to be correct, and subscribed their names thereto, and determined what persons had been, by the greatest number of votes, duly elected as representatives in Congress from Virginia; and endorsed and subscribed on said statements a certificate of such determination and delivered them to the Secretary of the Commonwealth of Virginia.

And I further state, that on the said 29th day of November, 1902, I, as Secretary of the Commonwealth of Virginia, recorded, in a suitable book kept by me in my office for that purpose, each certified statement and determination as made by the Board of State Canvassers, and on the same day made out and transmitted to each of the persons thereby declared to be elected representatives in Congress from the State of Virginia, a certificate of his election, certified by me under my seal of office.

David J. Eggleston Jr

I, John S. Eggleston, a Notary Public in and for the city of Richmond and State of Virginia, hereby certify that the foregoing statement was subscribed and sworn to before me, in my said city and State, on this 28th day of January, 1904.

Given under my hand and official seal this 28th day of January, 1904.

John S. Eggleston

Notary Public.

My commission as a Notary Public expires on the 14th day of March, 1905.

IN THE

Supreme Court of the United States.

NO. 190.

OCTOBER TERM, 1903.

WILLIAM S. SELDEN & OTHERS,

vs.

ANDREW J. MONTAGUE, GOVERNOR OF VIRGINIA, AND OTHERS, CONSTITUTING THE STATE BOARD OF CANVASSERS OF VIRGINIA.

APPEAL FROM THE CIRCUIT COURT OF THE U. S. FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE APPELLEES.

STATEMENT OF THE CASE.

This was a suit in equity brought in the Circuit Court of the United States for the Eastern District of Virginia. Upon the filing of the bill, the court below issued a rule against the defendants, requiring them to show cause why an injunction should not be granted the complainants in accordance with the prayer of the bill. The defendants filed an answer to this rule which was in effect a demurrer to the bill, setting forth the grounds upon which the court should decline to award an injunction upon the facts stated in the bill.

Upon hearing the rule, the court was of opinion that upon the allegations of the bill, the complainants were not entitled to any relief, and entered an order dismissing the cause; and from this order, the present appeal has been taken.

The case stated by the bill is that all of the complainants suffered wrong at the hands of the registrars in refusing to put their names upon the registration lists, and that one of the complainants suffered wrong at the hands of the judges of election from their refusal to receive his vote.

The averment as to two of the complainants is, that they applied to register, and were refused registration. As to one of these, it is alleged, that he took no appeal from this refusal of the registrars, "because he did not believe he was bound to appeal, or that he would get justice if he did." As to the other, the averment is, that he "appealed to the judge of the corporation court, and was informed his appeal was filed too late."

The ordinance of registration gave the right of appeal to any applicant who was denied registration, and it is obvious that the averments of the bill present no justification for the omission on the part of these two complainants to take timely steps for redressing any alleged wrong done to them by the registrars.

Neither of these two complainants alleged that they offered to vote at all; their only grievance consists in having been rejected by the registrars, which rejection they made no effort to redress in the manner pointed out by the registration ordinance.

The other complainant, William H. Anderson, avers that when he applied for registration, the registrars admitted him to register by reason of his having served as a soldier, and pretended to place his name on the registration lists after examining his discharge from the United States army, which he exhibited to them; and that he offered to vote on election day, and his vote was rejected because his name had been entered on the registration lists as William *A.* Anderson instead of William *H.* Anderson; that his description in other respects on the registration lists was correct; that he offered to be sworn as to his identity, but the judges of election rejected him; that he tried to find the judge of the corporation court to obtain redress, and found the judge was out of town.

Whether the failure on the part of the registrars to enter the name of this complainant correctly on the registration lists was

intentional or not, it was the duty of Anderson to have examined the lists in due time to ascertain whether or not his name was correctly entered, and have the error corrected by appeal to the courts, as was permitted by the law, for which there was ample time and opportunity under the provisions of the registration ordinance, since the registration was required to be closed on or before October the 15th, 1902, and the election did not take place until November the 4th, 1902.

The judges of election are required by the statute of Virginia to reject the vote of any person applying to vote, unless his name is placed upon the registration books. If the name is not found on the registration books, they have no discretion. If the name is found on the registration books, still the voter may be challenged, and in case of such challenge, the judges of election are required to examine him on oath as to his qualifications, and if he takes the prescribed oath, they are required to receive the vote, unless they be satisfied from evidence adduced before them, or their own knowledge, that he is not a qualified voter.

The provision of the ordinance of registration as to appeal is contained in Section 7, which reads as follows:

> "Section 7. Any person denied registration shall have the right to appeal, without payment of writ tax or giving security for costs, to the circuit court of the county, or to the corporation court of the city, in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing to have his right to register determined, containing a statement of the facts proved before said board, to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

"Upon filing of such petition, the clerk of the court shall at once give notice to the commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

"Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor (of) the petitioner."

The statutes of Virginia, in relation to the casting of votes and challenges to voters, and how the challenge is tried, are contained in Section 125 of the Code of Virginia of 1887, as amended by Act of Assembly of March the 6th, 1890 (Acts of 1889-'90, page 191), and Act of July 28th, 1902 (Acts Extra Session of 1902-'3, page 12), and in Sections 126 and 127 of the Code of 1887. The sections, as amended, read as follows:

"Section 125. *Where ballot-box kept; how ballots received, and names of voters entered on poll-books.*—The ballot-box shall be kept in public view during all elections. The judge to whom any ballot is delivered shall, upon the receipt thereof, pronounce, in an audible voice, the name of the person from whom the ballot is received, and if his name is found on the registration book, and there be no objection made, the said judge shall, without opening the said ballot, or permitting it to be examined (except to ascertain whether it is a single ballot), deposit the same in the ballot-box, whereupon the name of the elector shall be checked on the registration book by one of the judges, and entered by the clerks of election on the poll book, and correctly numbered: provided, that when a registered voter has changed his place of residence from one election district to another in the same county, if he has

a certificate showing that he was duly registered in his former election district in said county, and that his name has, since his removal, been erased from the registration books of said election district, it shall be evidence to entitle him to vote in the district in which he resides, and his name shall be registered on the registration book by the registrar, if he be present, or by one of the judges of election, if he be not present: provided, further, that no person who removes from one city or county to another city or county in this State shall be allowed to vote at any election therein without having first registered upon his transfer at the time and in the modes prescribed in sections seventy-eight and eighty of the Code of eighteen hundred and eighty-seven; and provided, further, that in cities or towns containing over two thousand inhabitants the name of such person shall not be entered by the judge, but only by the registrar, prior to or on the days named in section seventy-eight of the Code."

"Section 126. *Challenges.*—Any elector may, and it shall be the duty of the judges of election to, challenge the vote of any person who may be known or suspected not to be a duly qualified voter."

"Section 127. *How Challenge Tried.*—When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him as to the same; and if the person insists that he is qualified, and the challenge is not withdrawn, one of the judges shall tender to him the following oath: 'You do solemnly swear (or affirm) that you are a citizen of the United States, that you are twenty-one years old, that you have resided in this State for twelve months, and in this county, city, or

town for the three months next preceding this election; and that you are not disqualified from voting by the constitution or laws of this State; that your name is (here insert the name given); that in such name you were duly registered as a voter of this election district; that you are now an actual resident of the same; that you are the identical person you represent yourself to be; and that you have not voted in this election, at this or any voting place, so help you God.' If he refuses to take such oath, his vote shall be rejected; if, however, he does take it, his vote shall be received, unless the judges be satisfied, from record or other legal evidence adduced before them, or from their own knowledge, that he is not a qualified voter, in which case they may refuse to permit such person to vote. And they are hereby authorized to administer the necessary oaths or affirmations to all witnesses brought before them to testify as to the qualifications of any person offering to vote. When any person's vote shall be received, after having taken the oath prescribed in this section, it shall be the duty of clerks of election to write on the poll books, at the end of such person's name, the word 'sworn.' "

The Board of State Canvassers, the defendants to the bill, consists of the Governor, Secretary of Commonwealth, Auditor of Public Accounts, Treasurer, and Attorney-General of the Commonwealth of Virginia, who are constituted the board under Section 139 of the Code of Virginia of 1887, which reads as follows:

"Section 139. *Board of State Canvassers.*—The Governor, Secretary of the Commonwealth, Auditor of Public Accounts, State Treasurer, Attorney-General, or any three of them, shall constitute the Board of State Canvassers."

The duties of the board are defined in Section 142 of the Code of Virginia of 1887, which reads as follows:

> "Section 142. *How Election Returns Canvassed by State Board and Certificates of Election Given.*—For the purpose of canvassing the result of elections, the Board of State Canvassers shall meet at the office of the Secretary of the Commonwealth on the fourth Monday in November next after the election, when they shall, upon the certified abstracts on file in the office of the Secretary of the Commonwealth, proceed to examine and make statements of the whole number of votes given at any such election for Attorney-General, members of the Senate and House of Delegates, Representatives in Congress, and electors of President and Vice-President of the United States, or for so many of said officers as have been voted for at such election, which statements shall show the names of persons to whom such votes have been given for either of the said offices, and the whole number given to each, distinguishing the several districts, cities and counties in which they were given; they shall certify such statements to be correct, and subscribe their names thereto; and they shall thereupon determine what persons have been by the greatest number of votes duly elected to such offices, or either of them, and shall endorse and subscribe on such statements a certificate of such determination, and deliver them to the Secretary of the Commonwealth. The Secretary of the Commonwealth shall record in a suitable book, to be kept by him in his office for that purpose, each certified statement and determination as made by the Board of State Canvassers, and shall, without delay, make out and transmit to each of the

persons thereby declared to be elected (except the Attorney-General, who shall be commissioned by the Governor), a certificate of his election, certified by him under his seal of office. In the election of a Senator, he shall also forward to the clerk of the Senate a certificate of the election of such Senator; and in the case of the election of a member of the House of Delegates, he shall forward to the clerk of the House of Delegates a certificate of the election of such member. And upon the first day of the session of the General Assembly, he shall lay before each house a list of the members elected thereto, with the districts they represent. In cases of special elections to fill vacancies held at any other time than that fixed for general elections, the Board of State Canvassers shall meet at the office of the Secretary of the Commonwealth on the day after the returns of such elections are received, for the purpose of canvassing the result of such special elections in the manner hereinbefore set forth; and if all the abstracts of votes to be counted shall not have been received within the twelve days, the said board shall adjourn, from day to day, until they shall be so received by the Secretary of the Commonwealth."

Sections 139 and 142 were enacted in the year 1870 in substantially the same form in which they now stand in the Code of Virginia. (See Acts of 1869-'70, chapter 76, secs. 45, 48-50.)

The said sections, as well, also, as the provisions of the Code apportioning representation of the State of Virginia in the House of Representatives, and other provisions relating to their election, contained in the statutes of Virginia on that subject (see Code of 1887, secs. 50-53), were enacted by the State of Virginia, in pursuance of the Constitution of the

United States, Article I, Section 4, Clause 1, which reads as follows:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed by each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

Congress has heretofore allowed the States to make regulations on this subject. Shortly after the Federal Constitution was adopted, Virginia, in pursuance of this provision, enacted laws apportioning her representation in the House of Representatives, declaring when and how members of that House should be chosen, and providing for the returns of such elections and declaring the results thereof. (See 12th Hening's Statutes at Large, 653; 13th Hening's Statutes at Large, 331; 1st Tucker's Blackstone, 191.)

These methods have, from time to time, been changed in form, but regulations on the subject have existed continuously in the statute law of Virginia. The statute in relation to the canvassing of the returns and issuing certificates of election to members of the House of Representatives (being Section 142 of the Code, already quoted) has been in force in substantially the same form as it now stands in the Code since its enactment in 1870. This statute is a valid act of the Legislature, passed pursuant to the authority granted by the Federal Constitution, and establishes the only method in existence for ascertaining and certifying the results of elections of members of the House of Representatives in Virginia.

The respondents were elected to their offices under the Constitution and laws of the State of Virginia existing prior to the adoption of the present constitution and registration ordinance, complained of in the bill, and the validity of said Sections 139 and 142 of the Code of Virginia is not denied or questioned by the complainants, nor is the title of the respondents to their offices as *de jure* and *de facto* officers denied.

The acts required by the statute to be done by the State Board of Canvassers could be performed only in their official character as members of the board, and none of the acts could be done by any member of the board alone or individually.

This statement of the facts and the statutes of Virginia is, we believe, sufficient to enable us to state intelligently to the court the grounds upon which the respondents resisted the application for an injunction in this case and our reasons in support of those grounds:

ARGUMENT ON THE POINTS PRESENTED.

I.

The first objection made is, that the case is a suit against the State of Virginia, and prohibited by the 11th amendment of the Federal Constitution. We shall hereafter endeavor to show that the averments of the bill do not set forth any threatened act which could constitute an actionable wrong, if performed, and did not constitute any ground for the intervention of a court of equity in advance of performance, upon various grounds; but, for the purposes of the discussion of the present objection, we will assume that the plaintiffs have set forth a grievance in their bill and would be entitled to an injunction if the State of Virginia had no interest in the matter.

Our contention is, that the suit against the Board of State Canvassers is either a suit against the State of Virginia, or, if not so considered, that the State of Virginia would be an indispensable party to any relief; and this proceeding is barred, because she cannot be brought before the court.

In order to determine whether this be a suit against the State or not, it is necessary to examine carefully what is the nature of the case made and the precise relief sought by the bill.

Let it be assumed that a wrong was done the complainants by the alleged refusal or failure of the registrars to put their names upon the registration books, and by the alleged refusal of the judges of election to allow the complainant, Anderson, to vote; still those wrongs were past, and the present suit was not

brought for the purpose of redressing those wrongs, and no relief granted in this suit could have the effect of redressing those alleged wrongs.

The present suit is not for the purpose of recovering damages for a refusal to register the plaintiffs, nor for a refusal to receive their votes at the election held on November the 4th, 1902. Being a suit in equity, it could not, of course, have that effect. The suit is not brought against the registrars who conducted the registration, nor the judges who conducted the election. It is not brought (if it could be brought at all) for the purpose of compelling the registrars to place the name of the complainants upon the registration lists, nor to compel the judges of election to receive their votes, nor for the purpose of enjoining either of those classes of officers from interfering with or hindering them in the exercise of their alleged right to register and vote. The primary right of the voter is the right to register and vote. When the voter sues in damages for the wrongful deprivation of that right, or brings proceedings to enforce specifically its enjoyment, he does not interfere with the rights and interests of other voters and other members of the body politic of the State. This court has denied that equity has the jurisdiction to enforce by injunction, mandatory or otherwise, the enjoyment of even this right, because it is political in its character; but in this case the complainants are not seeking the enforcement of these distinct rights of each voter, but are asking that the court will declare the entire election held on November the 4th, 1902, to be void, and, upon that ground, restrain the Board of State Canvassers from canvassing the returns from the whole State of Virginia, and from issuing the certificates of election to those persons who received a majority of the votes cast at that election for members of the House of Representatives.

The relief prayed for could not be granted without affecting the rights of others not before the Court. It would restrain the Board of State Canvassers in the performance of duties and functions that are purely political and governmental under a statute of Virginia, passed in pursuance of the Federal Con-

stitution itself—duties and functions devolved upon the board, solely as a public and governmental agency, in the performance of which, not only the Commonwealth of Virginia, but the United States itself is concerned.

If this be a correct statement of the relief prayed, it is plain, we submit, under the decisions of the Supreme Court of the United States, that the case constitutes a suit against the State of Virginia.

In the case of *Cunningham* v. *Railroad Co.*, 109 U. S. 452, this court, in an opinion delivered by Mr. Justice Miller, defined the two classes of cases in which suits against officers of a State can be maintained in the Federal courts without violating the 11th amendment. The first class of cases stated by Mr. Justice Miller are cases where the State officer is sued in an action at law for damages occasioned by an act injurious to the plaintiff, and the officer seeks to justify his action under a State statute which is unconstitutional. This class of cases refers to actions to recover damages for a wrongful act, and must necessarily be in the form of an action at law. The second class of cases defined by Mr. Justice Miller in the case just cited consists of cases in which the Federal courts have been called upon by an injunction, mandatory or prohibitive, to compel or to restrain the doing of some act on the part of a defendant, who is an officer of the State. In defining the cases in which the Federal courts may take jurisdiction under this class of cases, Mr. Justice Miller used the following language, saying that such a suit can be maintained, "where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter *not affecting the general powers or functions of the government*, but in the performance of which one or more individuals have a *distinct interest, capable of enforcement by judicial process.*" (Italics ours.) 109 U. S. 452.

And the court added, that the Federal courts, in entertaining some cases arising under this last class, have gone to the "verge of sound doctrine, if not beyond it, and the principles should be extended no further." 109 U. S. 453.

If the present case be tested by the limits defined in this

carefully guarded language, it is plain that it goes far beyond the bounds fixed by the court in that case. In the first place, the complainants have not a *distinct* interest in the performance of the duties imposed upon the Board of State Canvassers, but an interest intermingled with that of every other member of the body politic in Virginia. All persons who voted at the election held on November the 4th, 1902, have an interest in the action of the Board of State Canvassers, which was sought to be restrained. All persons who failed to vote at that election are presumed in law to have assented to the action of a majority of those voters and are, therefore, interested. The candidates for the House of Representatives voted for have an interest; the Commonwealth of Virginia and the United States each has a profound interest; not a property interest, nor an interest of a pecuniary character, but an interest of the most fundamental and important character in their political capacities. The State of Virginia is entitled to representation in Congress under the Constitution of the United States, and has a direct interest, which will be obstructed and interfered with, and, indeed, temporarily destroyed by any operative or effective injunction against the action of the State Board of Canvassers. For the relief prayed for in the bill could be granted, if at all, only upon the ground that the election held on November the 4th, 1902, was itself void.

Inasmuch as any relief given would necessarily affect this important interest of the Commonwealth of Virginia, she would be an indispensable party to the bill. If the defendants represent her, the suit is forbidden by the 11th amendment of the Federal Constitution. If they do not, the proceeding is barred by the fact that she is an indispensable party, and cannot be brought before the court.

The complainants' alleged rights, then, are not distinct rights, as required by the language of Mr. Justice Miller in 109 U. S., capable of enforcement by judicial process, but are rights which, if capable of enforcement at all by judicial process, are rights which the complainants enjoy only as a part of the body politic,

and in common with all other members of the body politic in Virginia.

When we come, on the other hand, to consider the duties and functions of the defendants constituting the Board of State Canvassers, it will be equally seen that those duties are of a character precisely opposite to that which Mr. Justice Miller lays down as a condition to the jurisdiction of a Federal court when a suit is brought against officers of the State. He says that the suit must be brought to compel the performance of a well-defined duty in regard to a specific matter *"not affecting the general powers or functions of the government."*

In the present case, the duties of the board sought to be restrained are strictly and purely governmental, affecting the entire body politic in its relation to the State and Federal governments. The relief prayed is necessarily against the respondents in their political capacity. It constitutes a suit against the action of the State itself, necessarily affecting the rights and interests of the State, and of the people generally, of which the State itself is the only representative, under principles of public law. The defendants discharge their duties solely as a board, and in the discharge of those duties they have no private interest whatever.

The complainants' interest, whether it be to compel or prevent the canvassing by the defendants of the votes cast at the election held on November the 4th, 1902, is not a private and distinct interest, in which they alone are concerned, but is a common and general interest, which they share with all other members of the body politic, to have the operations and functions of government performed or restrained, as the case may be.

The defendants are an agency of the State of Virginia, established in accordance with the Federal Constitution, for canvassing the returns of members of the House of Representatives. It has been established by this court in the cases of *McCulloch* v. *The State of Maryland*, 4 Wheat., 316; *Collector* v. *Day*, 11 Wallace 113, and in a great number of other cases, that neither the United States, nor the several States, can interfere with or

obstruct the agencies and instrumentalities of the other sovereignty, lawfully established, for the purpose of carrying out its purposes and executing its powers within the sphere of its duties and functions. The act of Congress giving jurisdiction to the Federal courts was never intended to transgress this fundamental rule of the partition of powers between the two governments, and, if so intended, it would have been contrary to the Constitution of the United States.

If an injunction had been granted by the lower court in accordance with the prayer of the bill, it would have afforded no redress to the complainants for the violation of the alleged rights claimed by them, which were the rights to register and vote, but would merely have prevented the Board of State Canvassers from certifying the results of the election and awarding certificates to the members of the House of Representatives elected from Virginia. In other words, it would have controlled the political action of the Board of State Canvassers, as one of the agencies of the government of Virginia, but would not have redressed any right of the complainants capable of judicial cognizance or enforcement by the courts, as a private or distinct right of the plaintiffs; for it will hardly be contended that a voter, because his vote has been refused, can resort to a court of equity to declare the entire election void on that ground.

It is well settled that it is not necessary that the State *eo nomine* should be made a party, in order that the suit may be against her, contrary to the 11th amendment. The suit is equally prohibited if the action is against the officers of the State to control their governmental and political action.

We, therefore, respectfully submit that upon these grounds the present case does not fall within the line of cases in which the Federal courts have taken jurisdiction to compel or restrain a State officer in doing some act which the plaintiff was entitled to have performed or restrained as a matter of individual right, but falls within that class of cases in which the jurisdiction has been declined, because the object of the suit was to control the officers of the State in the discharge of duties relating to the revenue or property, or the political interests and action of the

State. *Louisiana* v. *Jumel,* 107 U. S. 711; *Hagood* v. *Southern,* 117 U. S. 52; *Cunningham* v. *R. R. Co,* 109 U. S. 446; Ex Parte Ayers, 123 U. S. 443, and cases cited in the foregoing cases; and *McCawley* v. *Kellog,* 2 Woods' Circuit Ct. Rep. 13; *Collector* v. *Day,* 11 Wallace, 113. Fitts v. McGhee, 172 U.S. 516, 525, 530.

II.

The defendants in their answer further contended that there was no act of Congress under which the jurisdiction in this case could be supported. See Paragraph 7 of the Answer.

Counsel for the plaintiffs in the lower court, for the purposes of the jurisdiction of the court, relied on Section 629, Clause 12, of the Revised Statutes; Section 629, Clause 16, construed with Section 1979 of the Revised Statutes, and upon the act of 1887, as amended by the act of 1888, governing the general jurisdiction of circuit courts; but we respectfully submit that the jurisdiction cannot be supported under any of these provisions.

Section 629, Clause 12, relates solely to suits to recover damages suffered in consequence of some act done under a statute of the United States, relating to revenue, or to the right of voting, the principle underlying the provision being that every person who sustains damages whilst acting under a law of the United States should have a standing in a Federal court for redress. Opposing counsel construe the provision as giving jurisdiction of suits to enforce the right to vote; but, obviously, this is not the meaning or effect of the act, as may be seen by reference to the statutes on which the clause is founded, cited in the margin of the Revised Statutes. In addition, the act of May 31st, 1870, and February 28th, 1871, as embodied in the United States Revised Statutes, were repealed by act of February the 8th, 1894, 28th U. S. Stats., page 36, chap. 25.

The jurisdiction of the lower court cannot be supported under Section 629, Clause 16, and Section 1979. See *Holt* v. *The Indiana Manufacturing Co.,* 176 U. S., page 68; *Giles* v. *Harris,* 189 U. S. 475.

The lack of any averment of the requisite jurisdictional

amount in the bill prevents this case being supported under the act of Congress of 1887, as amended by the act of May 13th, 1888. We respectfully submit, that Clause 7 of the Answer sufficiently presented this objection to the jurisdiction of the lower court.

Counsel for the plaintiffs in the lower court seemed to rely somewhat, for the purposes of the jurisdiction, on Section 722, United States Revised Statutes. It is plain that this section does not define the extent or scope of the jurisdiction of the Federal courts, but simply adopts forms of procedure prevailing in the States for the purpose of enforcing civil rights. It applies only to civil rights, and it may be doubted whether it embraces proceedings in equity. But, be that as it may, the equity system in Virginia, like that prevailing in the Federal courts, is founded upon the jurisdiction and practice of the equity courts in England, and is subject to the same rules and restrictions as prevail in the Federal courts.

Accordingly, *Giles* v. *Harris*, 189 U. S. 475, and the authorities upon which it is founded, denying jurisdiction of a case like this in equity, are as pertinent upon the subject of the jurisdiction of the equitable forum in Virginia as they are in the United States courts.

III.

The next objection made by the defendants to the maintenance of this case was, that the bill asserts political rights, and seeks to restrain political duties and functions, on the part of the defendants, the State Board of Canvassers, and that a court of equity is without any jurisdiction to entertain the suit or make any order in it.

It needs, we submit, no argument to show that the suit is of the nature above stated, and, that being so, the only question is, whether equity has jurisdiction of such a suit.

It has been held, in a number of cases, that equity has no such jurisdiction. See *Green* v. *Mills*, 69 Fed. Rep. 852, and the cases there cited; *Mississippi* v. *Johnson*, 4 Wall., 475; *Georgia* v. *Stanton*, 6 Wall., 50; *Luther* v. *Borden*, 7 How., 1; In re

Sawyer, 124 U. S., 200; 1 Spelling on Extraordinary Relief, Secs. 630, 631, 692; *Alderson* v. *Comrs.*, 32 W Va., 640; *Fletcher* v. *Tuttle*, 151 Ill., 41, and cases cited; *Hardesty* v. *Taft*, 23 Md., 513; *R. R. Co.* v. *Degraff*, 27 Minn., 1; *Thompson* v. *Ewing*, 1 Brewster, 67; *Dickey* v. *Reed*, 78 Ill., 261; *Lane* v. *Anderson*, 67 Fed. Rep., 563; *Fleming* v. *Guthrie*, 32 W. Va., 1; 2nd Tucker on the Constitution, page 816; *Hughes* v. *Oldham*, 1 Hughes, 76; *Bynum* v. *Comrs.*, 101 N. C., 412; *Smith* v. *Myers*, 109 Ind., 1.

Reference, however, to the above cited cases is unnecessary, for this court has recently considered the question in the case of *Giles* v. *Harris* 189 U. S. 475, and decided that no such jurisdiction is possessed by a court of equity. We respectfully submit that this decision necessarily disposes of this case.

In neither of the cases cited by the appellants from Virginia Court of Appeals was the relief political. In the case of *Blanton, Comr.*, v. *Southern Fertilizer Co., etc.*, 77 Va., 335, the relief prayed was concerning a property right, namely, protection against a pecuniary charge or tax for selling fertilizers; and in *Pearson* v. *Supervisors*, 91 Va. 322, the relief prayed was the protection of tax-payers of a county against unlawful expenditures by the supervisors. In the latter case the Supreme Court of Appeals also held that equity had no jurisdiction in the particular case. It is plain neither of these decisions is opposed to our contention.

IV.

The next ground alleged by the defendants why the bill in this case cannot be maintained is, that the bill prays that the court shall decide that the election held on November the 4th, 1902, is void, and to restrain the Board of State Canvassers from certifying the returns of the said election for members of the House of Representatives.

The Constitution of the United States, Art. 1, Sec. 5, Clause 1, provides—

> "Each house shall be the judge of the elections, returns and qualifications of its own members."

It has been held that this provision makes each house the sole judge upon those subjects. This, we believe, is settled by all the authorities on the subject.

> "It will be sufficient to observe that the whole of the law and custom of Parliament has its original from this one maxim, 'That whatever matter arises concerning either house of Parliament ought to be examined, discussed and adjudged in that house to which it relates, and not elsewhere'; hence, for instance, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland. The Commons will not allow the Lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine into the merits of either case." 1st Blackstone's Commentaries, marg. p. 163.
>
> "Each house is made the sole judge of the election, return and qualifications of its members. The same power is vested in the British House of Commons, and in the Legislatures of the several States; and there is no other body known to the constitution to which such a power might safely be entrusted." 1st Kent's Commentaries, marg. p. 235.

Justice Story, speaking of the power, says:

> "If lodged in any other than the legislative body itself, its independence, its purity, and even its existence and action, may be destroyed or put into imminent danger. No other body but itself can have the same motives to preserve and

perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the right and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America." Story on the Constitution, Section 833.

"There are certain matters which each house determines for itself, and in respect to which its decision is conclusive. It chooses its own officers, except where, by constitution or statute, other provision is made; it determines its own rules of proceeding; it decides upon the election and qualification of its own members. These powers, it is obviously proper, should rest with the body immediately interested, as essential to enable it to enter upon and proceed with its legislative functions without liability to interruption and confusion." Cooley on Constitutional Limitations, marg. page 133.

In a note Mr. Cooley says:

"The Legislature cannot transfer its power to judge of the election of its members to the courts." Citing for the proposition, *State* v. *Gilman*, 20th Kansas; S. C. 27th Am. Rep. 189.

In delivering the opinion of the court in *People* v. *Hall*, 80 N. Y. 121, Folger, J., said:

"The power seems to have been established in the House of Commons, after a conflict. It was claimed and exercised at one time by the King and Council; at another by the House of Lords, and again by the Chancellor. (See Cox's

> Inst. of Eng. Gov. 117; May's Law of Parliament, 54; Hallam's Const. Hist. Wng., Vol. 1, 273.) In 1624 the Commons declared by resolution that it belonged exclusively to the House itself as an 'ancient, natural and undoubted privilege'; and since then the claim of the House seems to have been acquiesced in on all hands: (Cush. Law and Prac., 54.) The same author says that the power is so essential to the free election and independent existence of a legislative assembly that it may be regarded as a necessary incident to every body of that description which emanates directly from the people; and that the constitutional provisions are out of abundant caution: (Cush. Law and Prac., 54; and see Hammond's Political History, Chapter 3.)"

If an injunction would lie against the Board of State Canvassers to prevent their canvassing said returns and declaring the results of said election for members of the House of Representatives, and issuing certificates of election to the persons elected, the court might equally restrain all the steps in the election of representatives to the Lower House of Congress, and all the election officers, amongst others the registrars, who make up the lists of registration; the judges of election, who receive the votes; the Board of Election Commissioners, who canvass the returns in the several localities in the State, as well as the Board of State Canvassers, who canvass the returns from the entire State.

We believe that it cannot need argument to demonstrate that when the House of Representatives is made the sole judge of the qualification, election and returns of its members, it cannot be within the jurisdiction of any court, practically, to prevent the holding of the election, the casting of the votes and the canvassing of the returns of the election to the House of Representatives, which is a co-ordinate branch of the government.

The exercise of such jurisdiction would impair, and ultimately destroy, the independence of the House of Representatives.

It may be said that the specific relief prayed is an injunction against canvassing the returns and issuing certain certificates of election, and that it would still be competent for the House of Representatives to send for the returns and canvass them, and declare who had been elected.

It would still remain that the court would interfere with and control an agency provided by the Commonwealth of Virginia, pursuant to a provision of the Federal Constitution, for the purpose of ascertaining at least the *prima facie* right of members of the House of Representatives. Even a temporary interference with the membership of the Lower House of Congress might affect the membership and organization of the House.

Cases might be conceived in which, by the concurrent action of several courts, or even by the action of a single judge (if such a jurisdiction was recognized), the political complexion of the House might be changed, at least for a time, and the great difficulties in the way of remedying such an interference which would deprive members of their *prima facie* right are manifest. But the relief prayed in the bill goes much further; for it is based upon the sole ground that the election held on November 4, 1902, was absolutely null and void, and no injunction could be awarded upon the averments of the bill except upon that ground. If the court should make such a decision, its decree would be only in the air. It would not bind the House of Representatives, nor the persons who claim to be elected. The persons claiming to be elected could, notwithstanding the court's decree that the election was void, claim to be seated by the House, and the House of Representatives could actually seat them, and the decree of the court would be futile as to those most directly interested in it. We submit that no court will enter a decree in the air, which cannot bind the persons directly interested, and which the court is without the power of enforcing in an effective way.

The separation of the powers of the government forms the keystone of the republican arch, and is enforced by constitu-

tional provisions in the Constitution of the United States and of the different States, including Virginia. It is inconsistent with the independent existence of the House of Representatives that any court shall have power to interfere with and enjoin officers clothed with the duty of superintending the election or making returns of its members.

If the court would have power to declare such elections void, it would equally have power to compel the returns and even the ballots cast at the election to be brought into the court and actually destroyed; and if that were done, it is plain it would be impossible for the House of Representatives to determine upon the election of any person claiming a seat in that body.

V.

Another ground of defence set up by the defendants was that the complainants do not set forth in their bill any right capable of judicial cognizance or enforceable by any proceeding in court. The only substantive and enforceable right possessed by the plaintiffs, or by any one in like situation, is the right to vote, provided it has been granted under the law of the State, including, of course, the steps enabling that right to be exercised; and the violation of that right may be redressed by appropriate proceedings founded upon such violation against proper parties of whom the court has jurisdiction. But when an election has been concluded, and the returns are to be canvassed and the results of the election declared, it is obvious no single voter, or class of voters, can restrain the issuance of a certificate of election on the ground that the plaintiffs have been denied the privilege of voting under an unconstitutional statute; otherwise, a few voters, or perhaps a single voter, might nullify the results of the election because his right to vote had been improperly refused. In such cases, the only remedy lies in a contest of the election before a proper tribunal established by law for the purpose—in the present case before the House of Representatives—which would have jurisdiction to decide the matter, and could unseat, if it saw fit, the person claiming to

be elected, and seat the rival candidate, or nullify the election and order a new one, as might be proper upon the case made.

No court can enjoin the execution of a State statute simply because it is claimed to be, or is actually, unconstitutional, unless the relief asked in the particular case is based upon a sufficient ground of action appropriate for judicial cognizance and relief against proper parties subject to the jurisdiction of the court. The case stated in the bill in this case merely makes out an abstract or moot case. The bill is evidently brought not for the purpose of redressing the grievance the plaintiffs claim to have suffered (for no relief granted on the bill could have that effect), but in order to obtain the opinion of the court upon the abstract question, whether the Constitution of Virginia is a valid constitution, and whether the suffrage article of that constitution is a valid suffrage article. It has been repeatedly decided by this and other courts that suits will only lie to protect substantive rights by giving damages for their violation, or restraining their violation in the future; but not for the purpose of making a decree in a moot or abstract case. See

Marye v. *Parsons,* 114 U. S., 425;
Mills v. *Green,* 159 U. S., 651, 653;
Sulphur Mines Co. of Va. v. *Bowman,* 94 Va., 480;
Bigelow v. *Hartford Bridge Co.,* 14 Conn., 565;
Bank v. *Fresno Co.,* 52 Cal., 201;
First High on Injunctions, Secs. 7 and 9;
Brem v. *Houck,* 101 N. C., 627.

It is well settled that a bill of injunction is not a remedy for past injuries: High on Injunctions, Sec. 23 and Sec. 355; 144 U. S., 124.

VI.

Another objection to the relief prayed in the bill made in the lower court, was that so far as the complainants state their grievance to be a refusal of the registration officers to register them, it states no actionable wrong, for the reason that the said complainants claim in their bill that the new Constitution of Vir-

ginia and the registration ordinance are void, and if that be so, it plainly follows that any registration of their names under said constitution and ordinance of registration would have been equally void; and that therefore the failure or refusal to put their names on the registration lists could not constitute a legal wrong.

If, on the other hand, the said constitution and registration ordinance are valid in law, then the complainants were plainly bound to avail themselves of the remedy given in the ordinance for any failure or refusal to register them; and in either view, so far as the registration is concerned, they cannot complain, and their grievance in that respect would resolve itself into a case of loss or damage suffered by them without injury, or in consequence of their own default.

And so far as the alleged refusal to permit the complainant, William H. Anderson, to vote is concerned, he fails to show that he was entitled to vote; for in order to vote, it was necessary that he should be actually registered, This was held by this court in the case of *Wiley* v. *Sinkler,* 179 U. S., 58.

VII.

If the complainants were entitled to any remedy, they had a full and adequate remedy by a suit at law against the registration and election officers for damages; and having this remedy at law, they had no right to resort to a court of equity for relief. This remedy, by an action at law, was plainly the direct and appropriate remedy for any wrong suffered by the complainants (if they suffered any at all), and having this remedy, it is a fundamental rule that a court of equity will not entertain them. In addition, upon the same grounds, equity will not entertain such a suit as this, for the reason that the complainants will not suffer irreparable damage if the court should decline to entertain such a suit as the one at bar. Any damages to which they may be entitled could be recovered by them in an appropriate action for damages. Indeed, for the reasons we have already stated, the plaintiffs could not sustain any

damage at all, much less irreparable damage, *in respect to the particular act sought to be enjoined in this case.*

The act of the Board of State Canvassers in issuing certificates of election would not be a legal wrong to the complainants, nor could it cause them any damage in the proper sense of the term; for if any damage resulted, it would be, not to the complainants in their individual character or for any separate amount which they could estimate as their portion of the damage, but to the entire community or body politic. For damages of this nature, suffered by one in common with the rest of the public, it is well settled there is no private right of action, unless the complainant shows a peculiar and special damage to himself.

VIII.

If the court should be of opinion that the foregoing objections are unfounded, and that the court is at liberty to consider the merits of the bill, we respectfully submit that it is equally unfounded on the merits of the case attempted to be made by it.

On the merits the bill alleges four distinct grounds upon which the complainants claim the existing Constitution of Virginia and the ordinance of registration attached to and adopted with it to be unconstitutional and void:

First. Because by the act of Congress of January 26, 1870, they claim that there was established a permanent and continuing limitation upon the power of the State to restrict suffrage to any extent beyond the limitations contained in the former Constitution of Virginia adopted in 1869.

Secondly. Because the convention which adopted the existing constitution had no power to proclaim the constitution, but only had power to submit it for approval and ratification by the people.

Thirdly. That said constitution was void and of no effect, because the members of the convention who adopted the same did not take any oath as required by the former Constitution of Virginia; and

Fourthly. Because the complainants claim that the suffrage article of the present Constitution of Virginia is void, because by it the right of citizens of the United States to vote is denied or abridged on account of race, color or previous condition of servitude, contrary to the 15th amendment of the Federal Constitution.

We respectfully submit that none of these grounds of objection to the said constitution and ordinance of registration is sound.

Considering these objections in their order, we submit—

(a) Congress had no power to limit the right of the State of Virginia to regulate suffrage in accordance with the changing conditions and requirements of the people of the State. The said restriction was attempted to be imposed as a part of the reconstruction legislation of Congress following the late war between the sections. Various efforts were made on the part of the Southern States to bring the constitutionality of that legislation before the Supreme Court of the United States, none of which were successful, and consequently the validity of that legislation has never been directly passed upon. These efforts were made in the cases of *Mississippi* v. *Johnson,* 4 Wallace, 475; *Georgia* v. *Stanton,* 6 Wallace, 50, and in McArdle's Case, 6 Wallace, 318; S. C., 7 Wallace, 506. But while this court has never passed upon this legislation, we submit there is no doubt in the professional mind of the country as to what would have been the result of the matter if this court had been allowed to pass upon it.

That it is not within the constitutional power of Congress to make such a limitation upon the power of the State springs from the nature of the so-called "right" of suffrage and the control which all the States have over that subject. The so-called right of suffrage is not a natural or civil right, but is a political privilege which must be derived from the State itself. The only limitation upon the power of the State over the matter of suffrage arises from the provision of the Constitution of the United States that the right shall not be abridged nor denied by a State on account of race, color or previous condition

of servitude. The sole rights in this respect derived from the Federal Constitution are the right to be exempt from discrimination on account of race or color, and the right of citizens who are qualified as voters for the most numerous branch of the State legislature to vote for members of the House of Representatives.

United States v. *Reese,* 92 U. S., 215;
United States v. *Cruikshank,,* 92 U. S., 542;
Minor v. *Happersett,* 21 Wallace, 162;
United States v. *Harris,* 106 U. S., 637;
United States v. *Miller,* 107 Fed. Rep., 915;
Lackie v. *United States,* 107 Fed. Rep., 114, 118.

The State, therefore, has the right to determine for itself from time to time, provided it does not discriminate on account of race or color, what persons, or classes of persons, possess the intelligence, virtue and interest in the community entitling them to exercise the privilege of voting. The existence of this right to regulate suffrage and to change its qualifications from time to time, in accordance with the needs and exigencies of society, is one of the most important that can belong to a free people. Its existence is as important to the welfare of those who may be deemed unfit for the exercise of the privilege of voting as it is for the welfare of those who are entrusted with it. Under our system, it is impossible to conceive of a free and republican State deprived of this important right of restricting or extending the privilege of suffrage at its pleasure according to the changing needs of the community.

The Supreme Court of the United States has repeatedly held that while the effect of the late war was to establish hostile governments in the States which undertook to secede, the States themselves were never beyond the pale of the Union; that the States had no right to secede, and that the Southern States remained in the Union subject to the duties and clothed with the powers contemplated by the Federal Constitution, and entitled to all the rights assured by that constitution or reserved to the States or the people.

It cannot be necessary to quote from the numerous cases decided by this court to that effect. A reference to them is all that is deemed necessary in support of these contentions. See

Texas v. *White*, 7 Wallace, 700;
White v. *Hart*, 13 Wallace, 646;
Virginia v. *West Virginia*, 11 Wallace, 39;
Thorington v. *Smith*, 8 Wallace, 1, 9;
Wliliams v. *Bruffy*, 96 U. S., 176, 192;
Keith v. *Clark*, 97 U. S., 454, 465.

The power of Congress to pass the reconstruction measures, including the act of Congress of January 26, 1870, must be derived from the provision of the constitution that the United States shall guarantee to every State in this Union a republican form of government. (Art. IV., Sec. 4.) In executing this provision, Congress had the power, of course, to adopt such measures as were necessary and appropriate to secure that result, and if any particular provision is valid, it must be because it is necessary and appropriate as guaranteeing or insuring a republican form of government. It, therefore, gave Congress the power to compel the State to adopt or establish republican forms of government in order that they might participate in their privileges under the Federal Constitution, but it did not give to Congress a power of original legislation, or of establishing fundamental provisions of government in the various States. It is obvious that there may be a republican form of government without universal or unlimited suffrage; and it is still more obvious that it is inconsistent with a republican form of government, or with any form of a well-ordered government, that there should be an unalterable or unchangeable suffrage, no matter how much restrictions may be required by the conditions of the community. The power of the people to alter or restrict the suffrage according to their changing conditions and needs, so far from being inconsistent with a republican form of government, is, we respectfully submit, a necessary feature of a republican or free government. It must, therefore, be plain that it was beyond the power of Congress to affix a limitation or condition to the

admission of the State of Virginia which, so far from guaranteeing a republican form of government, necessarily impugned and took away the fundamental and sovereign power which has been universally deemed an essential right in every free government from the time of, and before, the establishment of the Federal Constitution itself.

When the people of Virginia adopted the constitution of 1869 and elected their State officers under it, it is plain they had organized a republican form of government in accordance with the requirements of the Federal Constitution; and the obligations of Virginia, the principal obligor to that constitution, having been performed, there remained nothing for the United States, the guarantor, to do except to admit the representatives of Virginia to representation in the Congress. The right of representation in Congress under the Federal Constitution belonged to Virginia as much as to the other States in the Union. That constitution established a union of equal States, and no discrimination or restriction against her sovereign rights can be imposed by any power. The Supreme Court has denied the right to impose restrictions limiting the sovereign rights of a State upon the admission of such State into the Union, and much less can such limitations be imposed upon States already in the Union. See the cases already cited; also *Williamette Iron Bridge Co.* v. *Hatch*, 125 U. S., 89, and cases cited.

It is alleged in the bill that the State of Virginia accepted this restriction, but this is incorrect. But even if such acceptance had been made, it would not have been binding upon the State, for it is a fundamental principle that the right to regulate suffrage from time to time as may be needed and required, is a fundamental and sovereign right which is inalienable, and cannot be parted with by any people so as to bind future generations.

We, therefore, submit that this restriction upon the sovereign rights of the State as a condition to the enjoyment of its constitutional right to representation in Congress was not binding upon Virginia either in law or in morals, and that Virginia

has the right to regulate suffrage within its borders as the changing conditions of society may from time to time require, to the same extent and in the same manner as that right is enjoyed by the States of Massachusetts and New York and other States belonging to the section which prevailed in the late war.

(b) We next submit that the existing Constitution of Virginia, and the schedule and ordinance attached thereto and made a part thereof, were validly adopted by the Constitutional Convention, and that the same became operative and effective for all purposes on July 10, 1902, in accordance with the mandate of said convention. The right of the convention to ordain the constitution without submission for ratification to the vote of the people is, we submit, beyond serious question. Mr. John Randolph Tucker, in his work on the constitution (at page 69), says:

> "When the convention frames a constitution, as that is its only charge, it is *functus officio*. Whether its consummated work shall be submitted to a vote of the people, and if so, what shall be the basis of suffrage, and what vote shall be necessary to give it final effect, are questions as to which there has been no settled canon in our political science and no uniformity of custom.
>
> "It may be stated, however, as a fact, that all the constitutions of the original States were ordained by convention, without a submission of the constitution so framed to a popular vote for ratification. The deliberative act of the representatives elected by the body politic was thought to have the sanction of the latter without a subsequent vote. And this was unquestionably the general view of all the States when, in the Federal Convention which composed the constitution in 1787, their consummate act was submitted for ratification to each State through its separate convention, without any subsequent sanc-

tion by the popular vote of its people. The amendments to the Constitution of the United States are to be adopted by the legislatures or conventions of the several States, without the necessity of submission to a popular vote.

"During the last half century or more it has been the usual practice for the convention to frame the constitution and then submit it to a popular vote for final ratification; but this practice has had exceptions, and it may be safely stated that the validity of a constitution will not be held to depend upon its final ratification by popular vote.

"The practice in Virginia may be mentioned as an example.

"The first constitution of Virginia, drawn by George Mason, was adopted in convention of the State on the 29th day of June, 1776, which was not ratified by popular vote. It was judicially held to be valid in *Kamper* v. *Hawkins,* 1 Va. Cases, 20, and continued in full operation until the constitution of 1830 was adopted. In that year a convention was called by legislative act to amend the constitution, and it decided to submit the constitution it proposed to the voters entitled to suffrage under the proposed constitution, which greatly enlarged suffrage beyond what had been allowed under the constitution of 1776. It was ratified by that popular vote. The constitution of 1850 was adopted in convention and submitted to a popular vote for ratification. The constitution of 1870 was adopted in convention and ratified by popular vote, but, by its twelfth article, amendments thereto may be proposed in the Senate and House of Delegates, and if agreed to by the majority of the General Assembly next chosen, shall then be submitted

to the people for ratification, and upon such ratification shall become a part of the constitution.

"The practice in other States need not be especially adverted to, except that recently the State of Mississippi adopted a constitution in convention, which was established by the act of the convention without a submission of it to the vote of the people. Whether such a constitution so established shall be held to be the constitution of the State, without the ratification by popular vote, has been questioned. All doubt of its validity would seem to be settled by the fact that the Constitution of the United States is held to be binding upon each of the States of the Union, though it was ratified by a convention of the people of each State, and not by any submission to popular vote. If, therefore, a constitution of a State should be held invalid because not ratified by popular vote, it would raise a doubt as to the validity of the Constitution of the United States, which was ratified by conventions without submission to a popular vote."

See also 1st Tucker on Constitutional Law, Sec. 58, pp. 72, 73; *Sproule* v. *Mississippi,* 69 Miss., 898; *State* v. *Neal,* 42 Mo., 119.

The constitutional conventions of Virginia of 1830 and 1850 in effect ordained their suffrage articles, submitting the residue of the constitution in each case to the enlarged class of voters enfranchised by the constitution.

The 12th section of the previous constitution of Virginia, adopted in 1869, provides for the amendment of the constitution. The first section, article 12, provides for amendment to be effected through the instrumentality of two succeeding legislatures, and provides that all amendments agreed to by a majority of the members of both Houses chosen at two successive elections may be proposed to the people, and if ratified by them,

shall become a part of the constitution. The second section of article 12 is in strong contrast with the section just referred to. It provides for the amendment of the constitution by a constitutional convention, and entirely omits any requirement that the action of the convention shall be submitted to ratification by popular vote, and the plain effect of the language used confers absolute power upon the convention to ordain the constitution adopted by it.

Opposing counsel rely upon the act of the legislature approved February 16, 1901, one of the provisions of which requires the constitution to be submitted to ratification by the people; but this provision, if it could have been constitutionally adopted at any time, was plainly too late, and was an unconstitutional limitation upon the powers of the convention. This will readily be seen by an examination of the second section of article 12, and by the acts of the legislature passed to carry that section into operation.

The second section of Art. XII. of the Constitution of Virginia, of 1869, reads as follows:

> "Sec. 2. At the general election to be held in the year 1888, and in each twentieth year thereafter, and also at such time as the General Assembly may by law provide, the question, "Shall there be a convention to revise the Constitution and amend the same?" shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly at its next session shall provide by law for the election of delegates to such convention: provided, that no amendment or revision shall be made which shall deny or in any way impair the right of suffrage, or any civil or political right as conferred by this Constitution, except for causes which apply to all persons and classes without distinction."

Pursuant to this provision, the Legislature of Virginia, by an act approved March 5, 1900, submitted the said question, "Shall there be a convention to revise the constitution and amend the same?" to the vote of the people.

An election was held under that submission and resulted in favor of holding the convention. This provision of the constitution, this act of Assembly, submitting the prescribed question to the voters, and the affirmative vote of the people in favor of the convention, definitively fixed its status and powers. In other words, the people ordained that there should be a convention empowered "to revise the constitution and amend the same." It is manifest that this matter having been so decided, there was no power in the legislature to restrict or impair the powers of the convention so ordered by the people. The constitution itself definitely provided what further action the legislature should take. The constitution declared: "In case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such convention."

Under the provision of the constitution, therefore, the legislature was restricted to providing for the election of the delegates to the convention already ordered by the people, and certainly had no power at that stage (if the legislature would have had constitutional power at an earlier stage to have done so) to limit the powers of the convention, but could only provide for the election of delegates to it.

Pursuant to the provision of the constitution, the legislature did, by the act approved February 16, 1901, make provision for the election of the members of the convention, and in addition went on to provide that the constitution when adopted by the convention should be submitted to ratification by the people.

To the extent that the act of February 16, 1901, provided for the election of delegates, it was pursuant to the constitution, and was valid. But the attempt to restrict the powers of the convention and to require any instrument adopted by

them to be submitted for ratification to the vote of the people was extra-constitutional, in derogation of the powers of the convention representing the people, and beyond the legislative power.

In addition to this, the question whether the existing constitution of Virginia was validly adopted and constitutes the true Constitution of the State is one which the Federal courts have no power to decide. It has been held that where there are two State governments in existence, each claiming to be the real government, it rests with the executive and legislative departments of the Federal government, and not the judiciary, to decide which is the true government of the State, and that the question is a political one of which the courts cannot take cognizance. See

Luther v. *Borden*, 7 How., 1;
Keith v. *Clark*, 97 U. S., 474;
Texas v. *White*, 7 Wall., 700.

In addition to this, the bill alleged that the existing constitution of Virginia had been recognized by the executive, legislative and judicial officers of the State. At the time the bill was filed the General Assembly of Virginia was in session, and had passed acts under and in pursuance to the said new constitution, and had recognized the said constitution, and these acts had been approved by the Governor of the Commonwealth. Both Houses of the General Assembly had passed a joint resolution in the following words:

"Resolved by the Senate (the House of Delegates concurring), That the Constitution of the State of Virginia ordained by the convention which assembled in the city of Richmond on the twelfth day of June, nineteen hundred and one, be, and the same is, hereby recognized by the General Assembly as the Constitution of Virginia; and

"Resolved further, That the members of each House of said General Assembly do now proceed to take and subscribe the oath or affirmation ordained by the said convention."

And the said constitution was in actual, peaceful operation, recognized by all departments of State government.

Accordingly, if there could be any serious doubt about the original power to ordain the constitution of 1902, and even if the question could be passed upon by the Federal Courts when there is no conflict and only one government in the State; still since the bill in the present case alleged that the constitution and schedule and ordinance had been recognized by every department of the State government, it is clear its constitutionality and validity could not be questioned or denied in the United States courts. See

Miller v. *Johnson*, 15 L. R. A., 524;
Woods' Appeal, 75 Pa. St., 59;
Luther v. *Borden*, 7 Howard, 1;
Virginia v. *West Virginia*, 11 Wallace, 39;
In re Sawyer, 124 U. S., 200;
In re Duncan, 139 U. S., 449;
Taylor & Marshall v. *Beckham*, 178 U. S., 548.

In the case of *Taylor* v. *Commonwealth*, decided by the Supreme Court of Appeals of Virginia at its Wytheville term, 1903, and reported Va. Law Reg., Sept., 1903, p. 381, it was held that the constitution of 1902 is the valid and existing constitution of the State of Virginia. We respectfully submit, that after this decision of the Supreme Court of Virginia as to what constitutes the true constitution of the State, it would not be competent for any other court to question the manner in which said constitution had been adopted.

See the cases cited *supra*.

(c) We submit, in the next place, that the objection made in the bill that the members of the convention did not take an oath, and therefore the constitution is invalid, is wholly without foundation.

This contention, we submit, is fully answered by what we have said under the foregoing head.

In addition, it is well settled, that even if officers are required

to take an oath, their acts under color of office are valid, although they may have failed to take the oath. See

Throop on Public Officers, Sec. 630, and cases cited;

Mechem on Public Officers, Secs. 329, 330 and cases cited.

THE SUFFRAGE ARTICLE.

(d) We come now to consider the most important of the grounds relied upon by the appellants in the attack they seek to make upon the present Constitution of Virginia, namely, that Article II., the suffrage article, is invalid because in violation of the fifteenth amendment to the Federal Constitution.

This is the basic contention upon which the acrimonious assault attempted to be made by the appellants rests.

We have so far forborne to consider this feature of the appellants' extravagant arraignment of the constitution and the convention which framed it, not because the charges they make have any foundation either in fact or in law, but because they have failed to present a case in which the question they discuss can be properly adjudicated by this or any other court. We did not care to debate an abstract proposition.

The question thus presented is, however, of such interest, and far-reaching importance, that we beg leave to reply to the criticism to which the appellants have subjected this feature of the Virginia suffrage article.

Their contention is that Article II. of the Virginia Constitution deprives the complainants and other negro citizens of Virginia of the right to vote, "on account of their race or color."

The defendants, and the Commonwealth, whose officers they are, are fully prepared to meet and refute any such charge whenever it shall be presented in a case in which its decision is necessary to the proper adjudication of the cause.

If this was such a case, or if ever such a suit is instituted in

any court having jurisdiction of the subject and of the parties, it can be abundantly shown, and doubtless will be demonstrated, that the charge is fallacious both as a statement of fact and as a proposition of law.

The decision of any such case must be controlled by the following irrefutable postulates:

1. The States of the Federal Union, and the States alone, are vested with plenary power and discretion to determine who shall be clothed with the duty, the privilege and the right of suffrage, subject only to the condition prescribed in the fifteenth amendment to the Constitution of the United States that the right to vote shall not be denied or abridged on account of race, color or previous condition of servitude.

2. Any qualification for the exercise of the duty, privilege and right of voting which does not deny or abridge that right because of the race, color or previous condition of servitude of the citizen may be prescribed by the State.

3. Those citizens of a State who, by its laws framed in conformity with the limitations of the fifteenth amendment, are made to constitute the electorate who shall choose the members of the most numerous branch of the legislature of such State, are made Federal electors, by Clause 1 of Section 2 of Article I. of the Federal Constitution and assured the right to vote for members of the House of Representatives.

4. While any such Federal elector will have a cause of action against any election officers of the State who shall wrongfully deny him the exercise of his right to vote at any Federal election, such right to vote at any such election, though founded in and assured by the Federal Constitution, is primarily derived from the State and does not exist when the State has withheld the grant of such right for any cause or upon any ground, other than the race, color or previous condition of servitude of the citizen.

5. Subject to the limitation of the fifteenth amendment, the

States have entire control of the subject of suffrage within their respective jurisdictions, and may prescribe the qualifications for its enjoyment, and have the exclusive right to decide as to the reasonableness, the justice, and the wisdom of those qualifications. Massachusetts, New York, and Virginia may each, for itself, determine who shall constitute its electorate, without let or hindrance from the other States or the general government, provided only that there must be no denial or abridgement of the right to vote "on account of race, color or previous condition of servitude."

6. In determining what the qualifications of a voter shall be, it is competent for the State to fix, as tests of fitness, characteristics which, though possessed by both white and colored citizens, are possessed by the whites in larger proportion than the blacks; for instance, the qualifications of intelligence, military service in time of war, the ownership of property, or any other qualities or attributes which are not based on the race, color or previous condition of servitude of the citizen.

These propositions are established by the following decisions:

United States v. *Reece*, 92 U. S., 215;
United States v. *Cruikshank*, 92 U. S., 542;
Minor v. *Happersett*, 21 Wall., 162;
United States v. *Harris*, 106 U. S., 637;
United States v. *Miller*, 107 Fed. Rep., 915;
Lackie v. *United States*, 107 Fed. Rep., 114, and
Williams v. *Mississippi*, 170 U. S., 213.

A careful scrutiny of the provisions of the Virginia suffrage article will show that none of its provisions are repugnant to these cardinal rules of constitutional validity.

The qualifications prescribed for voters by that article of the Virginia Constitution are as follows:

I. The requisites as to citizenship, residence, &c., are prescribed in Section 18 of the Virginia Constitution, which is in the following language:

Sec. 18. Every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city or town one year, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

These requirements as to citizenship, sex, age, residence, &c., are universal, and apply to all races and colors alike.

II. For the voters to be enrolled upon the general registrations required to be made in 1902 and 1903 the requisite qualifications are set forth as follows:

Sec. 19. There shall be general registrations in the counties, cities and towns of the State during the years nineteen hundred and two and nineteen hundred and three, at such times and in such manner as may be prescribed by an ordinance of this convention. At such registrations every male citizen of the United States having the qualifications of age and residence required in section eighteen shall be entitled to register, if he be:

First. A person who, prior to the adoption of this constitution, served in time of war in the army or navy of the United States, of the Con-

federate States, or of any State of the United States or of the Confederate States; or

Second. A son of any such person; or

Third. A person who owns property, upon which, for the year next preceding that in which he offers to register, State taxes aggregating at least one dollar have been paid; or,

Fourth. A person able to read any section of this constitution submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

A roll containing the names of all persons thus registered, sworn to and certified by the officers of registration, shall be filed for record and preservation, in the clerk's office of the Circuit Court of the county, or the clerk's office of the Corporation Court of the city, as the case may be. Persons thus enrolled shall not be required to register again, unless they shall have ceased to be residents of the State, or become disqualified by section twenty-three. Any person denied registration under this section shall have the right of appeal to the Circuit Court of his county or the Corporation Court of his city, or the judge thereof in vacation.

(1) The first and second of these qualifications—military services rendered his state or country, as a soldier in time of war, prior to the adoption of the constitution, or that he is a son of any such soldier—will be briefly considered together.

Each of these provisions applies alike, though in different proportions, to the white and colored citizens of the State.

There were 151,337 negro soldiers enlisted in the United States army during the Civil War. (See Vol. 2, Historical Register and Dictionary of the United States Army, page 285.) The records of that army to which we have had access do not show how many of these were from Virginia, but, as Virginia, by the census of 1860, had more than twelve per cent. of the negro population of the country, and as large portions of her territory were within or near the lines of the Federal armies during the Civil War, and thousands of her colored population during that period left her borders and went to Washington and to other points permanently held by the military forces of the United States, it is fair to estimate that at least one-eighth of these colored soldiers were from Virginia.

The total colored population in 1860 was 4,441,830. (12th Census U. S., Vol. I., p. 115.)

Virginia's colored population in 1860 was 548,907. (Compendium 12th Census, p. 12.)

There were also a number of colored soldiers from Virginia in the service of the National Government during the Spanish-American war.

All of these who survive, and their sons, were entitled, if possessing the qualifications of residences prescribed in section eighteen, to be registered and to vote.

It will be observed also that this qualification is not limited to soldiers who enlisted from Virginia, or their sons. It embraces all of the survivors of the 152,000 colored soldiers of the Civil War, and all of those of the Spanish-American War, and all of their sons, who have lived in Virginia for the requisite period.

There is accordingly no racial discrimination in these provisions. They automatically admit to the right of suffrage thousands of colored men and thousands of white men. It is true that they admit many more of the whites than of the colored race; but this is because many more white than colored men have either been soldiers in time of war, or are the sons of such soldiers.

There can be no objection, upon any account, to allowing all men who have served their people in time of war to have a voice in the government of the State. Those who have risked their lives in the service of their country have the strongest claims to such recognition.

(2) Whatever may be said as to the justice or expediency of such a provision, there can be no objection based upon the language of the fifteenth amendment, or upon any other clause of the Federal Constitution, to admitting the sons of veterans to the right to vote.

It applies alike to the sons of colored and to the sons of white soldiers, and that is a sufficient answer to the charge that it is in contravention of the Federal Constitution.

These classes of citizens are not admitted to suffrage because they or their fathers were white soldiers, or were colored soldiers, but because they were soldiers who have imperiled their lives in the service of their people, or are the sons of such soldiers.

The expediency, the wisdom or the justice of the clause extending the right of suffrage to the sons of soldiers is not a question for this court, or for any court. As to that, within the limits already stated, the power of the State is supreme; but it cannot be amiss to point out here that this provision was not based upon any consideration of favoritism. Nor was it a capricious or an arbitrary exercise of power.

As a rule, as a matter of just consideration for the patriotic and self-sacrificing services rendered and the heroic qualities exhibited by the soldiers of our country, upon both sides, in the Civil War, and upon our country's side in every contest in which we have been involved with other nations, it was considered that it would be wrong to deny the right of suffrage to the sons of these gallant men.

There was another consideration which goes far to justify this clause in the Virginia suffrage plan. The Virginians who survived the Civil War were generally too poor to give their children the benefits of education. There was then no system

of public education at all, and for a number of years afterwards no adequate public school system in the State.

Without any fault of theirs or of their parents, many of the sons of these veterans, of both races, had had no opportunity whatever to obtain the education necessary to enable them to comply with the otherwise reasonable and just educational qualification which the Convention prescribed as a requisite to the right to register and vote. Many of these young men were sons of veterans who had fallen in battle or lost their lives by disease during that war, or had survived it with maimed bodies; or, if without disabling wounds, without education and without fortune, to confront the ordeal of a desperate struggle for subsistence for the wives and children who, in the midst of a desolate land, fondly awaited their return to their humble homes.

It was believed to be right not to deny suffrage to the sons of such men.

Whether the Constitutional Convention did or did not err in this, its action in this regard was clearly not in contravention of the fifteenth amendment or of any limitation of the Federal Constitution, and cannot be brought in question in this court.

The next clause in the Virginia suffrage article is one which vests the right to vote in,

(3). Every male citizen having the requisite qualifications as to age and residence, &c., who is the owner of property upon which State taxes aggregating at least one dollar were paid in 1901 or in 1902.

This is a small property qualification, applying alike to white and colored citizens, though necessarily in variant proportions.

The State tax rate in 1901 and 1902 was forty cents upon the one hundred dollars of assessed values; so that the effect of this clause was to vest all male citizens, without regard to their color, with the right to register and vote, provided they owned property of any kind of the aggregate value of not less than two hundred and fifty dollars, on which the State taxes were paid for the year 1901 or for the year 1902.

Under this provision many thousand were given the right of suffrage. By far the greater number of these were whites; but

there were, as the public records of the State show, thousands of negroes who owned property of the requisite value to entitle them to register and vote under this requirement.

At all events, there was in it no discrimination on account of color or race..

The voters whom it enfranchised were admitted to suffrage not because they were whites or because they were negroes, but because they had such a stake in the community, or, in the language of the immortal Bill of Rights of Virginia, because they afforded "sufficient evidence of permanent common interest with and attachment to the community" to entitle them to be clothed with the power, the responsibility and the trust of suffrage.

The citizen who might not be included in its terms were excluded not on account of race or color, but because they were considered to have no such fixed and abiding interest in the State as to entitle them to claim suffrage as a right.

A large majority of the male citizens of the State, of voting age, were, as it was believed, embraced in the foregoing three clauses; but there remained quite a large number who were neither soldiers nor sons of soldiers, nor owners of property worth two hundred and fifty dollars.

These embraced a considerable number of men owning very little or no property, some of them men of more or less education, others of them uneducated, but intelligent, good and worthy citizens, and justly entitled to be clothed with the right of suffrage.

These also included the large number of ignorant and vicious men of both races; but, as the census of illiteracy and the statistics of crime show, belonging most largely to the colored population. Among these were the very numerous and ignorant class known as "cornfield negroes," and also the troublesome and vicious class of negroes, some in the country, but more largely frequenting the towns, who, while ignorant or unmindful of the duties of good citizenship, often had some smattering of education.

The dense ignorance or the mischievous traits and propensities of these men rendered it dangerous to the peace and well

18089

being of society to place in their hands a power which they were incompetent to use, except to the great detriment of the State and to their own serious injury.

The Constitutional Convention, therefore, adopted the qualifications expressed in the fourth subdivision of section 19, as a method of excluding as far as practicable these citizens of the State, who were utterly unfit for the exercise of this most important duty of freemen.

This clause admits to suffrage:

> (4). A person able to read, or, whether he can read or not, to understand and give a reasonable explanation of any section of the Constitution submitted to him by the officers of registration.

This is an intelligence qualification, designed to exclude from the electorate citizens who were unfit to be enrolled as voters, It applies alike, and without any discrimination, to whites and blacks.

If it debars negroes from the right to vote, it does this, not on account of their race or color, but on account of their ignorance of the ordinary duties of citizenship under the government under which they live.

If it shuts out from suffrage more of the negroes than it does of the whites, as is undoubtedly its purpose and effect, it does this because there are many more ignorant negroes and many more negroes who have no conception or comprehension of the government and institutions and of the simplest and plainest provisions of the organic law of the State than there are white men who are profoundly ignorant and incompetent.

Nor is this remarkable. On the contrary, it would be passing strange if the men of that virile Caucasian stock, who wrested Virginia from the wilderness and the savage and founded a civilization there which has radiated its influence to the farthest bounds of the republic, who are sprung from and have enjoyed the inherited benefit of the experience and training of the most masterful of all the races of mankind, come down to them through the vicissitudes, the trials and the triumphs of a thous-

and years, did not possess more of intelligence and more of governmental capacity and comprehension of the duties and the laws of citizenship than the mass of the less fortunate and less richly endowed negro race—"a child race"—which, as a rule, has had less training and less preparation for citizenship than had the ancestors of their white fellow citizens ten centuries ago.

Whatever else may be said of this "understanding" clause—and there has been much of gratuitous invective wasted in its unjust denunciation—it is beyond any question absolutely free from any repugnance to the fifteenth amendment to our Federal Constitution. Nor is there any other inhibition of that Constitution which it contravenes.

But the question here discussed is no longer an open question in this country. This identical question arose and was settled by the unanimous decision of this court in *Williams* v. *Mississippi*, 170 U. S., 213.

The clause in the Virginia Constitution, now being considered, is, in the particulars in which the appellants have attempted to impeach it, the same, in meaning and effect, as the clause of the Mississippi Constitution, which was reviewed and sanctioned by this court in *Williams* v. *Mississippi*—the only difference material to the present discussion being one favorable to the Virginia clause, namely, that it is made to operate for less than eighteen months, while that of Mississippi was prescribed as a permanent qualification for suffrage.

The Convention evidently had the Mississippi suffrage clause and the discussion of this court in *Williams* v. *Mississippi* in view when it adopted this provision substantially in the language of the Mississippi Constitution.

The Mississippi clause is as follows:

> "Sec. 244. On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of the State; or he shall be able to understand the same when read to him, or give a reasonable interpretation there-

of. A new registration shall be made before the next ensuing election after January the first, A. D. 1892."

This "understanding" clause was unanimously adjudged by this court not to be in conflict with the fifteenth amendment.

The reasoning and the decision of this court in that case conclusively disposes of the main question attempted to be raised in this cause, and establishes the validity of the Virginia suffrage article.

In that case the plaintiff attacked the validity of the Mississippi "understanding" clause upon substantially the same grounds urged by the appellants in this case, and this court said that the Constitution and the statutes of Mississippi "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

It would be impossible to conceive of a statute for the registration of voters under which evil administration would not be possible. Not only is this true, but it cannot be denied that there are very few, if any, States of our American Union the administration of whose registration and election laws has not been in many, though generally exceptional, instances characterized by partiality, favoritism, illegality, and sometimes by corruption, fraud and crime.

This happens not because of any vice in the constitutions or statutes of these States, but because of the imperfection and weakness of human nature and the willingness of some registration and election officers, dominated by bitter political partisanship or by some sordid or venal consideration, to resort to lawless, corrupt or criminal methods in order to control and carry elections in the interest of faction, of party or of "the ring."

The vice is not in the laws, but in their administration. The laws are valid and constitutional, but their administration is, in such cases, illegal.

In the leading case of *Yick Wo* v. *Hopkins*, 118 U. S., 356, Mr. Justice Mathews, in delivering the opinion of this court,

carries the doctrine of the effect of the mal-administration of an otherwise valid law to the utmost limit; but he defines the proposition he formulates as a "principle of interpretation."

He says (at page 373):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This great jurist had already, in enunciating the decision of this court in that case, demonstrated and held that the ordinances of the city and county of San Francisco, impeached in that cause, were, upon their face, in conflict with the fourteenth amendment, because their manifest and necessary effect was to deprive Yick Wo and other persons in like position with him of their inalienable right to make a livelihood by the conduct of a lawful, honest, harmless and useful business and trade; that these ordinances were shown by admitted facts to be plainly and illegally discriminating in their operations; and that the mode by which they deprived these Chinese laundrymen of their rights, guaranteed to them by the Federal Constitution and the law of the land, was none the less invalid, for the reason that it was accomplished through the agency of the supervisors of said city and county, because these officials accomplished the purpose of the ordinance, not by the discharge of any definite duty or the exercise of any legitimate and reviewable discretion, but in the unrestrained exercise of arbitrary power.

In describing the power of these supervisors, Mr. Justice Mathews says (at page 366):

> "The power given to them is not confided to their discretion, in the legal sense of that term, but is granted to their mere will. It is merely

> arbitrary, and acknowledges neither guidance nor restraint."

The facts developed as to the actual administration of the ordinances are referred to, in confirmation of the determination of the court as to the meaning and effect of the text of the ordinances, and the language cited above is used in the definition of the rule as to the propriety of interpreting laws in the light of their practical operation; but we do not understand the learned judge to hold, or this court ever to have decided, that a valid and constitutional law will be rendered unconstitutional and void by a vicious, lawless or unconstitutional administration of such law.

A fair and reasonable construction of the language of Mr. Justice Mathews, quoted above, is that if a law, fair and valid on its face, "be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust discriminations between persons in similar circumstances, material to their rights, the denial of equal justice" (by such evil administration of the law) "is still within the prohibition of the Constitution,."

We are unwilling to believe that this court will ever take the illogical and fallacious position that any valid and constitutional enactment can ever be made unconstitutional and void by the unlawful, partial and unconstitutional administration of such law. If so, there can hardly a law be pointed out, either Federal or State, which would not go down before such a rule; for there is no law, capable of being mal-administered, which will not ordinarily be mal-administered sometimes, and we know that the most salutary statutes are often so abused by those charged with the duty of their execution.

But, again, the case presented by the Virginia intelligence qualification for suffrage, whenever it shall be properly and fairly brought under review in this court, will be found not to be included in the rule laid down by Mr. Justice Mathews, whatever the construction of that rule may be; for this court, in *Williams* v. *Mississippi,* 170 U S. (at page 223), expressly

held as to an "understanding" clause identical, as to the principle involved, with that of Virginia:

> "We do not think that this case is brought within the ruling in *Yick Wo* v. *Hopkins, Sheriff*, 118 U. S., 356."

It is further to be remarked that this clause of the Virginia Constitution is to be distinguished from the San Francisco anti-Chinese ordinances in this, that the Virginia enactment did not vest any arbitrary power in the officers who were to execute it, but clothed them with discretionary power, to be exercised fairly, justly and impartially; devolved upon these registration officers a duty, coupled with this discretion, in the discharge of which duty their action could be reviewed and controlled by the courts; gives to any citizen whose rights are denied or abridged by any act of the officers of registration a simple, an inexpensive and a summary remedy for the prompt redress of such wrong; and that the Virginia statute holds these registration officers to a strict accountability for any wilful infraction of duty, by denouncing and punishing any such misconduct as a crime.

Section 19 of the Constitution provides:

> "Any person denied registration under this section shall have the right of appeal to the circuit court of his county, or the corporation court of his city, or the judge thereof in vacation."

And section 7 of the registration ordinance is as follows:

> "Sec. 7. Any person denied registration shall have the right to appeal, without payment of writ tax or giving security for costs, to the circuit court of the county or to the corporation court of the city in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing to have his right to register deter-

mined, containing a statement of the facts proved before said board; to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

"Upon the filing of such petition, the clerk of the court shall at once give notice to the Commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

"Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor (of) the petitioner."

And section 3854 of the Code of Virginia punishes any fraudulent or wilful registration or refusal to register a qualified voter, in the following terms:

"Sec. 3854. *Wilfully Rejecting or Corruptly Registering a Voter; How Punished.*—If any registrar wilfully or maliciously reject from registration, or corruptly register any person, contrary to law, he shall be fined not less than fifty nor more than one hundred dollars, and be confined in jail not less than three nor more than twelve months."

In conclusion, we may be permitted to say that the argument for the appellants is founded upon the fallacy that the right to vote is a natural, a primary and an absolute right. It is unnecessary in this court to refute such a proposition, for it is, and has been too often, settled that suffrage is a relative, and a purely statutory right, which is the possession of only those

upon whom organized society, or the State, may see proper to confer it. If this were not true, all of the members of the body politic, of whatever age, or sex, or mental status, would be entitled to an equal voice in the government. Under the fundamental law of this representative republic, the State has the right to deny this power to any of its citizens whom it considers that it would be unsafe or unwise to entrust with its exercise; and the only limitation upon this right is that it shall not be used so as to exclude from suffrage any citizen merely on account of his race, or his color, or his previous condition of servitude.

The immediate and the remote consequences involved in the decision of the issues here outlined, whenever they are presented in a cause in which they can be properly adjudicated, are so momentous that they challenge the most earnest consideration of the jurist and the patriot.

It is true that they involve the question of suffrage, so far as the right to its exercise is based upon intelligence, the possession of property, or upon military service in time of war. In this way it affects the descendants of the African and of the Caucasian races without any unconstitutional discrimination; for the State has, in making any distinction, seized upon characteristics which are, in a large degree, possessed by both races. But its adjudication will not only in this way affect the subject of Caucasian suffrage and African suffrage in the states of the American Union, but it will affect the question also of Mongolian and Malayan suffrage in this land, which is looming up into portentous importance upon the horizon of the future.

In its determination this court will be asked to pronounce the suffrage article, deliberately framed by the deputies of the Virginia people, to be unconstitutional and void, and thereby to bring about a condition of chaos in that Commonwealth, with results the disastrous effects of which it would be difficult to exaggerate.

We know that this court should not, and will not, hesitate to decide any question of which it has adequate jurisdiction,

according to the right—even one involving such consequences—where the unconstitutionality of a law has been clearly established. But we most earnestly submit that it will not do this in any case of doubt; that, even if it was not manifest, as we believe it to be here, that there is no discrimination in this suffrage article on account of race, or color, or previous condition of servitude, this court would pause before it would hold such an act of a State to be unconstitutional.

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Mr. Chief Justice Waite, in Sinking Fund Cases, 99 U. S., 718.
>
> "The courts should not declare a statute unconstitutional unless its constitutionality is clear beyond any reasonable doubt." Allen, J., in *People* v. *Allentson*, 55 N Y., 54.

Such is the established rule which governs in the construction of an ordinary statute enacted by the legislature of a State.

How much more strongly do the principles upon which it is founded apply to the solemn and deliberate enactment of any provision of their organic law, by the delegates of a people in convention assembled?

Such an enactment must stand, "unless its unconstitutionality is clear beyond any reasonable doubt."

Still less will the courts adjudge the enactment to be invalid where, as is the case here, it is manifestly not in contravention of the Federal Constitution.

It is impossible to calmly and dispassionately consider the questions here discussed without being forced to the conclusion

that they are questions of a political character, affecting not only governmental action, but the fundamental political rights of the people of the state, and their relations to their governments, state and national, in such a manner and to such a degree that any adequate relief is entirely outside of the province of the courts; and that the remedy is any such case, if a wrong has been perpetrated, can only be afforded and administered by the political department of the government, or by the people themselves in their organized political capacity.

Such matters are clearly within the domain of political and legislative action, where, however injurious the consequences of the measure adopted may be, certain political, and probable social chaos and confusion and disaster can alone be remedied or mitigated.

It is right, therefore, that the courts should not take jurisdiction of this case, or of any other case involving the political rights, the existence of the organized government and the governmental functions of the people of a State within the sphere of State action and jurisdiction.

Respectfully submitted,

WILLIAM A. ANDERSON,
Attorney-General of Virginia.

FRANK W. CHRISTIAN,
Counsel for Appellees.

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Supreme Court of the United States

OCTOBER TERM, 1903.

JONES AND OTHERS

vs.

VIRGINIA STATE BOARD OF CANVASSERS.

No. 189—In Prohibition.

SELDEN AND OTHERS

vs.

SAME.

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Argument of William A. Anderson, Attorney-General of Virginia, before the Supreme Court of the United States, in the Virginia Suffrage Cases above mentioned, on behalf of the Defendants, and of the Commonwealth of Virginia. Final Argument April 4th and 5th, 1904.

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No duty has yet or is likely ever to come to me in my lifetime which involves graver responsibility than that which I have to meet to-day, and in its discharge I bespeak the indulgence and kindly consideration of the court; for it is impossible for me, as it would be for an advocate far more gifted than I, to present in all its just strength and power the cause of Virginia as its merits and the truth entitle that cause to be presented here.

It is impossible to read the records in these cases, or to consider the fierce invective of the written and the oral arguments of the counsel for the plaintiffs, without perceiving that these suits are in substance and in fact suits against the State. To be sure the State is not made a party defendant by name—her Governor and the other general officers of the State at the capital being made the nominal defendants—but her officers are sued in their official and governmental capacities, under circumstances which present a case which it would be difficult to find not to be a suit against the State if any suit could ever be so considered. It is the government of Virginia, and not the persons composing that government in their individual or non-representative character, which has been attempted to be arraigned at the bar of the court below, and which has been assailed with so much bitterness in this court.

Let us briefly review the various steps in the argument of the counsel for appellants.

He rests his case upon the following propositions:

> First. That the Constitution enacted by the convention which met in the city of Richmond on June 12, 1901, is not the Constitution of that State, but is an absolutely invalid act and a nullity—
>
> (1) Because the members of that convention failed to take any oath, and
>
> (2) Because that Constitution has never received the sanction of the electorate which chose the members of the convention.
>
> Second. That even if the Constitution enacted by the convention is in other respects a valid constitutional enactment, yet the suffrage article (Article II. of said Constitution) is invalid or unconstitutional—
>
> (1) Because it is in contravention of the following "fundamental condition" prescribed by Congress in the act of January, 1870, admitting

Virginia to representation in the Congress of the United States, viz.:

"That the Constitution of Virginia shall never be amended or changed so as to deprive any citizen or class of citizens of the United States of the right to vote, who are now entitled to vote by any Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law."

(2) Because the provisions of this suffrage article are in conflict with the fifteenth amendment to the Federal Constitution.

Third. That it necessarily follows that the registration of the voters of the Commonwealth had in the year 1902, pursuant to the terms of said pretended Constitution, and the registration ordinance adopted by the convention, and the election of congressmen held in November, 1902, by the voters so registered, were invalid and void.

Fourth. That the plaintiffs in these two suits in the court below were citizens of the United States and of the State of Virginia, and qualified voters of the State in the year 1902, and were unlawfully deprived of the right to register and to vote at said election, and are entitled now to have said Constitution, and particularly Article II. thereof, and the registration ordinance enacted in connection therewith, adjudicated in these causes to be void and unconstitutional acts and nullities; to have said election declared by the court to have been illegal and void; and to have by an injunction in the one case, and a writ of prohibition in the other, the Governor of Virginia and the other general officers of the State at her capital, constituting her State Board of Canvassers, enjoined and prohibited from canvassing

> the returns of said election and giving certificates of election to the persons shown by said returns to have received the majority of the votes cast in their respective congressional districts.

A discussion of these several propositions is proper in order to show that the plaintiffs have no substantive personal grievance which entitles them to implead the defendants upon any such state of facts; that the Circuit Courts of the United States have no jurisdiction of any such questions or subject matter; and that, even if the plaintiffs ever had any such grievance or cause of action against these defendants, it is absolutely impossible for any court in any such proceeding to grant substantial relief or to afford any redress, under the circumstances of the case, for such supposed injuries and grievances.

I.

The contention that the convention and its acts were invalid is based upon a misapprehension of the law, and upon a singular mistake as to the facts upon which it is founded.

As to the claim so earnestly relied upon that it was the duty of the members of the convention to take the oath of office prescribed in the Constitution in force at the time of their election, it is only necessary to say that that oath was required by that Constitution only of *officers of the State government*, and I have been able to find no authority anywhere that has ever held that members of a constitutional convention are officers of a State government. They are the deputies and representatives of the people in their sovereign capacity, clothed with broad and comprehensive powers, without any limit to their tenure of the representative position to which they are chosen; and the very purpose for which they are chosen—namely, to amend and alter the existing constitution of government—would seem to make it incongruous, if not improper, for them to take an oath to support and carry out the provisions of the very instrument which it is their business to revise and alter.

As stated by Mr. Jameson, of the whole number of State constitutional conventions whose proceedings were accessible to him, "about one-half only have administered an oath." Jameson on Constitutional Conventions, secs. 277-282.

This is a question of Virginia law, as to which the precedents furnished by that Commonwealth should be at least influential; and neither the members of the Virginia Constitutional Convention of 1776, nor of that of 1829, nor of that of 1850, considered it obligatory upon them to take any oath whatever.

There was no provision in the preceding Constitution of Virginia requiring the members of a constitutional convention to take an oath. There was such a requirement in the fourth clause of section 1 of Article III. of that Constitution as originally framed by the Reconstruction Convention; but that clause was stricken out of the instrument by a majority of nearly 40,000 in the popular vote cast at the election at which that Constitution was adopted.

Even if there had been such a requirement in the former Constitution as is contended, it would have been *ultra vires* and void, because, if such a provision in a Constitution is valid and binding it would be competent for the people of one generation to tie the hands of their posterity in all future generations in respect to the exercise of the primary, fundamental, and inalienable right of changing and altering their constitutions and institutions at pleasure.

But even if it could be fairly claimed that it was obligatory upon the members of the convention to take an oath, their refusal to do so would not impair the validity of their otherwise valid acts. This would seem to be settled by the following authorities:

Gonzales v. *Ross*, 120 U. S., 605;
In re Ah Lee, 6 Sawyer, 410;
Duncan v. *McCall*, 139 U. S., 449, 462;
Mechem on Public Officers, secs. 329, 330, 255, 262;
Throop on Public Officers, sec. 630.

Nor does the second ground relied on—namely, the fact

that the Constitution of 1901-2 was ordained without its submission to the vote of the people—render it invalid. This will appear from an examination of the provisions of the former Constitution of Virginia, in force when the convention met.

The provisions of Article XII. of that instrument, controlling this subject, are as follows:

"ARTICLE XII.

"FUTURE CHANGES IN THE CONSTITUTION.

"Any amendment or amendments to the Constitution may be proposed in the Senate and House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes taken thereon and referred to the General Assembly to be chosen at the next general election of senators and members of theHouse of Delegates, and shall be published for three months previous to the time of making such choice. And if, in the General Assembly so next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people in such manner and at such times as the General Assembly shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the General Assembly voting thereon, such amendment or amendments shall become part of the Constitution.

"At the general election to be held in the year 1888, and in each twentieth year thereafter, and also at such time as the General Assembly may

> by law provide, the question, 'Shall there be a convention to revise the Constitution and amend the same?' shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified voting at such election shall decide in favor of a convention for such purpose, the General Assembly at its next session shall provide by law for the election of delegates to such convention." * * *

It will be seen that two (2) methods were prescribed by that Constitution for its amendment—one by the General Assembly, and the other by a constitutional convention. The first is provided for by the first paragraph, and the second by the second paragraph, of that article; and an inspection of those provisions will show the difference between an amendment to be accomplished by legislative initiative, and amendments to be effected by constitutional enactment; and the contrast and striking difference between the requirements in the one and in the other case will make apparent the distinct purpose of the Constitution and its meaning and effect in these particulars.

In the one case, the Legislature was merely authorized to propose amendments. Such amendments had to be approved and proposed by two successive General Assemblies, and then to be sanctioned by the popular vote, before they became a part of the organic law of the State.

In the other case, by the second paragraph of Article XII., the judgment and authority of the people of the Commonwealth were to be invoked upon the distinct proposition, in the language of the Constitution: "Shall there be a convention to revise the Constitution and amend the same?" If the voice of the people, at the election held to obtain their will upon this question, was in the affirmative, all that the General Assembly was required or authorized to do, by the express limitations of that Constitution was that, "at its next session," it should

"provide by law for the election of delegates to such convention." It was not competent for the General Assembly to prescribe any terms and conditions for the execution by the convention of the will of the people thus expressed at the polls.

The power and authority confided by the people in the delegates thus to be chosen was derived in no sense and no degree from any act of the General Assembly, but from the direct delegation of that power by the sovereign act of the people. The power thus conferred upon their deputies was not to formulate and propose amendments to the Constitution, but a plenary power "to *amend* and *revise* the Constitution," without limitation or restriction, except such as were created by the Constitution of the United States. Any action of the Legislature inconsistent with this plain and dominating provision of the Constitution was clearly *ultra vires*. So that we see that, as a conclusion to be derived from the language of the former Constitution itself, and from the express grant of power by the vote of the people, the convention was clothed with the complete authority and the duty of amending and revising the Constitution, and it was not incumbent upon it to submit its work to any popular vote for approval or rejection.

The *Legislature* could only *propose* amendments, which were inoperative until sanctioned by the votes of the people. The *Convention* was empowered to revise and amend by its own act.

Like the question as to the necessity for taking an oath, this also is a question of Virginia law, and the position for which we contend is sustained by the Virginia precedents and decisions.

In *Kamper* v. *Hawkins*, 1 Va. Cases, 20, it was decided by the Supreme Court of Virginia that the Constitution of 1776 (the first Constitution of Virginia), which was enacted by the convention of that year and was never submitted to a popular vote, was a valid enactment, and was the organic law of the Commonwealth.

But even if the contention of plaintiffs' counsel was well founded as of the date of the enactment of the Constitution,

there is no Federal question here; nor can there be any longer any question anywhere as to whether the Constitution of 1901-2 is the organic law of Virginia, for the reason that every department of the government of that State has recognized and accepted that instrument as the Constitution of the Commonwealth.

The members of the General Assembly, elected before its adoption and recognized and admitted to have been a *de jure* body, accepted it, as is shown in the record, not only by the solemn act of all of its members except one in taking the oath to support it, but by the formal resolution they adopted, accepting it as the Constitution of the State, and by 606 acts passed in pursuance of, many of them distinctly in execution of, its provisions, found in the acts of the extra session of 1902-3.

The Governor formally recognized it by the proclamation convening the General Assembly, issued by him in pursuance of the terms of the Constitution, and all the executive officers of the State recognized it by taking the oath to support that instrument as the organic law of the State.

And the judicial department of the Commonwealth, as appears in the record, has recognized and "attorned" to it, by reason of the fact that every judge of the Commonwealth has taken the oath to support that Constitution.

But the question as to whether a particular enactment is the Constitution of a State is peculiarly and essentially a State question, and the decision of the highest court of that State is final and conclusive as to all the people of the State, as to the State and Federal courts, and as to the world, upon that subject.

What is the law of a State, whether organic or legislative, is a question concluded by the decision of the highest court of such State. This is established by the following adjudications of this court:

Luther v. *Borden*, 7 How., 1;
Baldwin v. *Kansas*, 129 U. S., 57;
Walker v. *Sauvinet*, 92 U. S., 92;
Duncan v. *McCall*, 139 U. S., 449.

The distinct question whether this Constitution is the organic law of Virginia arose in the case of *Taylor* v. *Commonwealth* (44 S. E. R., 754, and Virginia Law Register for September, 1903, p. 381)), and it was settled by the unanimous opinion of the Supreme Court of Appeals of Virginia in the affirmative.

In *Luther* v. *Borden* (*supra*), Chief Justice Taney, in the opinion of the court, said:

> "The point then raised here has been already decided by the courts of Rhode Island. The question relates altogether to the Constitution and laws of that State, and the well-settled rule in this court is that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the Constitution and laws of the State."

And this rule is stated, with even greater emphasis, by Mr. Justice Woodbury (who dissented upon other grounds) in his opinion (7 How., 58).

> See also *Elmendorf* v. *Taylor,* 10 Wheat., 159;
> *Bank of U. S.* v. *Daniel,* 12 Pet., 32.

II.

Having shown that the claim of appellants, that the Constitution of Virginia is a nullity, is unfounded, we come now to consider the second of their main contentions—namely, that the suffrage article (Article II.) is invalid.

(1) This claim is based—first, upon the ground that the Article referred to is in violation of the "fundamental condition" prescribed by Congress for the admission of Virginia to representation in that body. And, to sustain this contention, he insists with great earnestness that the State accepted and

pledged her faith to observe this "fundamental condition;" and, secondly, that it was in the power of Congress to impose such a condition, with or without the consent of the State, and that it is binding upon her and her people forever.

It is a sufficient answer to the first statement to say that it is not true in fact. The State could only bind herself, if she could be bound at all in any such matter, by some contemporaneous act of her General Assembly. The acts passed by the General Assembly of Virginia at the session of 1869-70, covering the period of the admission of her representatives into Congress, do not contain a line or a syllable which can be construed as an acceptance on the part of Virginia of said "fundamental condition," nor has any act or resolution ever been passed, or anything ever been done, by the General Assembly, or by any official of Virginia authorized in any sense to represent her or to act for her, by which she has ever accepted the terms of the alleged "fundamental condition," or expressly or by implication pledged her faith to its observance. Indeed, an examination of the journals of the General Assembly will show that no such resolution, bill or proposition was ever *offered* in either body.

If Mr. Zeph Turner or anyone else undertook, as appellants claim, to commit Virginia to any such proposition, any such action on his or their part was absolutely unauthorized by the State or any duly constituted authority of the State, and was utterly null and void.

All that the General Assembly did in the premises was, in compliance with the terms of the Reconstruction Acts to ratify the fourteenth and fifteenth amendments proposed by Congress to the Federal Constitution. That was done in good faith, and those amendments have ever since that time been recognized in Virginia by her legislative, executive, and judicial officers as binding upon the Commonwealth as parts of the supreme law of the land.

But even had the General Assembly undertaken to pledge the people of this Commonwealth to accept and observe forever

the terms of any "fundamental condition" such action would have been absolutely *ultra vires,* nugatory and void.

It was not competent for Congress to adopt a "fundamental condition" for Virginia which should be a part of her organic law. It was not competent for the General Assembly of Virginia to adopt an enactment which should be a part of her organic law. It was not competent for Congress and the General Assembly, both together, to adopt such a "fundamental condition" and make it binding upon the State.

Indeed, it would not have been competent for a Constitutional Convention of Virginia to have embodied in the organic law of the State a provision which would tie the hands of the people of this Commonwealth for all future time, in reference to a matter as to which each generation, or the people of the State at any time, have an absolute right to decide for themselves.

The right of the people to alter and amend their constitution of government is inalienable and absolute, subject only to the limitations of the Federal Constitution—a right which is an essential attribute of the sovereignty and freedom of any people.

It would not have been competent for Congress to have prescribed such terms as a condition for the admission *of a State into the Union* in such a way as to bind the people of that State after their admission into the Union.

In *Escanaba, &c., Co.* v. *Chicago,* 107 U. S., 678, it was held that—

> "Whatever limitation was placed upon the power of Illinois as a government and while in a territorial condition, either by the ordinance of 1787 or the legislation of Congress, such limitation ceased to have any operative force except as voluntarily adopted by her after she became a State of the Union."

Any other conclusion would make this a Union of unequal States—of States, some possessing all the attributes of sov-

ereignty and governmental freedom, subject to the provisions of the Federal Constitution, but others stripped of some of those essential powers, by statutes passed by Congress, without their consent, and in the exercise of a power which was never delegated to the Federal Government.

In the case from which I have just quoted, Mr. Justice Field, in delivering the opinion of the court, said:

> "Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same powers over rivers in her limits that Delaware exercises over Blackbird creek and Pennsylvania over Schuylkill river." Citing *Pollard* v. *Hagan*, 3 How., 212; *Permoli* v. *First Municipality*, 3. How., 589; *Strader* v. *Graham*, 10 How., 82.

And the above adjudication is approved in *Hamilton* v. *Vicksburg R. R. Co.*, 119 U. S., 284; *Huse* v. *Glover*, 119 U. S., 546; *Sands* v. *Manistee, &c., Co.*, 123 U. S., 296.

And in *Bolln* v. *Nebraska*, 176 U. S., 83-88, this court said in its opinion, delivered by Mr. Justice Brown:

> "But this court has held in many cases that whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted, after such territory has become a State in the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States, and, in the language of the Act of 1867, admitting the State of Nebraska, it stands 'upon an equal footing with the original States in all respects whatever.'" Citing *Card-*

well v. *American Bridge Co.*, 113 U. S., 205; *Willamette Iron Co.* v. *Hatch*, 125 U. S., 1; *Ward* v. *Racehorse*, 163 U. S., 504.

But the case of Virginia is far stronger than that of Illinois and the States embraced in the Northwest Territory, and included in the scope of the ordinance of 1787.

In her case it was not a question of her admission into the Union, as counsel seems to argue, but the question of denying her representation in Congress.

From the adoption of the Federal Constitution to the present time, as has been repeatedly settled by the decisions of this court, she has never been out of the Union.

Being a State in the Union, she was, by the express terms of the Constitution of the United States, entitled to representation in Congress, without any condition whatever. It was her absolute right, and, when Congress undertook to impose any conditions upon the exercise of that right which did not apply, under the Constitution, in equal measure to every other State of the Union, its action was absolutely void. Virginia has treated that condition as a nullity, and the decisions of this court fully justify her in this.

Virginia does not occupy any inferior position in this Union to that of her sister States.

I may, I hope, be pardoned for saying here that she was one of the makers of this Union, and that, but for the services and sacrifices of her people, the Union would never have existed.

She is a State of this Union coequal with any of her sister States.

If anything has ever been settled, or can be settled, by decisions of this court, that proposition has been settled; and it has never been, and can never be, successfully denied. That this is, and of right should be, a Union of equal States—equal in political rights, equal in governmental powers—has been established forever (if it ever could have been questioned) by the great opinion of Mr. Chief Justice Chase in *Texas* v. *White*,

7 Wall., 700. Among other doctrines enunciated in that decision was the declaration:

> "THE CONSTITUTION, IN ALL ITS PROVISIONS, LOOKS TO AN INDESTRUCTIBLE UNION, COMPOSED OF INDESTRUCTIBLE STATES."

Or, as it has been elsewhere formulated, *"an indissoluble Union of coequal and indestructible States."*

When this truth ceases to be a vital and controlling principle in the jurisprudence and life of the nation this government will cease to exist as a free republic.

If appellant's counsel is right in his contention, then this court was wrong in its decision in *Virginia* v. *West Virginia*. 11 Wall., 39, when it was decided that the government of Virginia—sometimes called "the Peirpoint government"—which gave its consent to the formation of the State of West Virginia was the lawful government of Virginia. If counsel is right in his view that the Reconstruction acts were valid enactments, then West Virginia was indeed, in the trenchant language of his illustrious father, "the bastard child of a political rape," and that State has never had a legal existence. If the government of Virginia which the Reconstruction acts overturned was not a legal government of Virginia, then no legal government of that State ever gave her consent to the establishment of the State of West Virginia, or to the cession to that State of the counties of Jefferson and Berkeley, for the State government which those acts and the United States army, acting in obedience to their mandate, overthrew, as being a pretended and illegal government, not even republican in form, was the same government which gave Virginia's consent to the formation of the State of West Virginia out of her territory.

It makes no difference to the case of Virginia, as presented here in these suits, how the appellants get out of this dilemma, or whether they get out at all, for the record concedes, what

may not be controverted, that her government in 1901, 1902, and 1903, the period when all the acts complained of are alleged to have been perpetrated, was a lawful government, and that all of the defendants in these suits in the court below were the *de jure* officers of a *de jure* State government.

If the Reconstruction acts were constitutional, the appellants cannot question the legality of the State government. If they were unconstitutional, they are estopped by the admissions in their pleadings from questioning the validity of that government.

THE SUFFRAGE ARTICLE.

We come now to consider the most important of the grounds relied upon by the appellants—namely, that Article II., the suffrage article, is invalid because in violation of the fifteenth amendment to the Federal Constitution.

Their contention is that this article deprives them and other negro citizens of Virginia of the right to vote "on account of race or color."

Let us see if this charge is sustained.

It cannot be denied that the States of the Federal Union, and the States alone, can determine who shall be invested with the duty, the privilege, the trust, and the right of suffrage, and that the only limitation upon this power in the States is that prescribed by the fifteenth amendment.

It has been settled by this court that the fifteenth amendment created no voters; that it conferred the right of suffrage upon no citizen; that its purpose, meaning, and effect were simply to prohibit the States from denying or abridging the right of any person to vote "on account of race, color, or previous condition of servitude."

Subject to this limitation, the control by the States of the matter as to who shall vote is absolute.

It is true also that those citizens of the State who have been given the right to vote for members of the most numerous branch of its legislature are, by clause 1, section 2, Article I., of the Federal Constitution made Federal electors, and are as-

sured thereby of the right to vote for representatives in Congress; but this right, though founded in and assured by the National Constitution, is primarily derived from the State, and does not exist where the State has withheld the grant of such right for any cause or upon any ground, other than the race, color, or previous condition of servitude of its citizens.

It follows logically and necessarily from these propositions that the States may, within their respective jurisdictions, prescribe any qualifications for suffrage which do not discriminate against any of its citizens because of their race, color, or previous condition of servitude; and it also necessarily follows that it is competent for the State, in determining what the qualifications of its voters shall be, to fix as tests of fitness characteristics which, though possessed by white and colored citizens, are possessed by the whites in larger proportion than by the blacks, as, for instance, the qualifications of intelligence, military service in time of war, the ownership of property, or any other qualities or attributes which are not based on race, color, or a former state of servitude. Indeed, almost any tests of fitness which could be prescribed for the exercise of this right would necessarily apply in diverse proportions to the white and the colored citizens of the State.

These propositions are established by the following decisions of this court:

United States v. *Reece*, 92 U. S., 215;
United States v. *Cruikshank*, 92 U. S., 542;
Minor v. *Happersett*, 21 Wall., 162;
United States v. *Harris*, 106 U. S., 637;
United States v. *Miller*, 107 Fed. Rep., 915;
Lackie v. *United States*, 107 Fed. Rep., 114, and
Williams v. *Mississippi*, 170 U. S., 213.

A careful examination of the Virginia suffrage article will show that none of its provisions is repugnant to the above cardinal rules of constitutional validity.

The qualifications prescribed by that article, so far as they are impugned in these suits, are:

I. The requisites as to citizenship, sex, residence, &c., prescribed in section 18, which is as follows:

> Sec. 18. Every male citizen of the United States, twenty-one years of age, who has been a resident of the State two years, of the county, city, or town one year, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city, or town shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days after such removal.

These requirements are universal, and apply to all races, and colors, and conditions alike.

II. For the voters enrolled by the general registration to be made in 1902 and 1903, the qualifications are prescribed as follows:

> Sec. 19. There shall be general registrations in the counties, cities, and towns of the State during the years nineteen hundred and two and nineteen hundred and three, at such times and in such manner as may be prescribed by an ordinance of this convention. At such registrations every male citizen of the United States having the qualifications of age and residence required in section eighteen shall be entitled to register, if he be:

First. A person who, prior to the adoption of this constitution, served in time of war in the army or navy of the United States, of the Confederate States, or of any State of the United States or of the Confederate States; or

Second. A son of any such person; or

Third. A person who owns property, upon which, for the year next preceding that in which he offers to register, State taxes aggregating at least one dollar have been paid; or,

Fourth. A person able to read any section of this constitution submitted to him by the officers of registration and to give a reasonable explanation of the same; or, if unable to read such section, able to understand and give a reasonable explanation thereof when read to him by the officers.

A roll containing the names of all persons thus registered, sworn to and certified by the officers of registration, shall be filed for record and preservation, in the clerk's office of the Circuit Court of the county, or the clerk's office of the Corporation Court of the city, as the case may be. Persons thus enrolled shall not be required to register again, unless they shall have ceased to be residents of the State, or become disqualified by section twenty-three. Any person denied registration under this section shall have the right of appeal to the Circuit Court of his county or the Corporation Court of his city, or the judge thereof in vacation.

These provisions were *alternative and independent in their operation*, and conferred the right to vote upon—

(1) Every citizen, white or black, who served as a soldier on either side in the Civil War, or in the army or navy of the

United States in any other war in which the country has been heretofore engaged;

(2) Every citizen, white or black, who is the son of any such soldier;

(3) Every white or colored citizen who was, in 1902 or 1903, the owner of property on which States taxes aggregating as much as one dollar were paid for the preceding year;

(4) Every citizen, white or colored, who can read and, whether he can read or not, can understand and give a reasonable explanation of a section of the Constitution submitted to him by the registration officers.

It will be seen that there is no discrimination or distinction in any of these clauses on account of race or color.

Let us briefly consider them in their order.

1. The qualification based on military service applies alike, though in different proportions, to the white and colored citizens of the State.

According to the Historical Register and Directory of the United States Army (Vol. 2, p. 285), there were 151,337 negro soldiers enlisted in the United States army during the Civil War. I have been unable to ascertain what number of these were from Virginia; but, from the proximity of the entire State, at various periods of that struggle, to the lines of the Federal armies, and the fact that large portions of her territory were within the Federal lines, it is fair to assume that Virginia, which had nearly one-eighth of the total colored population of the country in 1860, furnished at least one-eighth of these colored soldiers.

The total colored population of the country in 1860 was 4, 441,830, of which 548,907 were in Virginia. (Compendium of 12th Census U. S., Vol. 1, pp. 115 and 12.)

There were also a number of colored soldiers from Virginia in the Spanish-American War, and some also in the Indian wars.

All of these who survive, and also all of the 150,000 colored soldiers from any part of the country, and their sons, who

were living in Virginia in 1902 or 1903 for the requisite period, were made voters.

There is, accordingly, no racial discrimination in these provisions. They automatically admit to the right of suffrage thousands of colored men and thousands of white men.

It is true that they admit many more white than colored voters, but this is because many more white than colored men have either been soldiers in time of war, or are the sons of such soldiers.

Nor can there be any sound objection, upon any account, to allowing all men, who have served their people in time of war, to have a voice in the government of their State.

Those who have risked their lives in the service of their country have the strongest claims to such recognition.

2. There is no constitutional objection to admitting the sons of veterans to the right to vote. It is not prohibited by anything in the Federal Constitution.

This class of citizens and their fathers are not made electors because they or their fathers were white soldiers, or were colored soldiers, but because the fathers perilled their lives in defence of their people.

The expediency, the wisdom, or the justice of these provisions are not questions for any court, but it is proper that I should point out here that the provision under discussion was not based upon any consideration of favoritism, nor was it a capricious or arbitrary exercise of power.

It was considered that, as a rule, it would be wrong to deny the right of suffrage to the sons of the gallant men whose heroic qualities and patriotic and self-sacrificing services, in every contest in which the country has been involved, entitled them to the gratitude and just consideration of their countrymen.

As to the sons of the veterans of the Civil War, there were considerations which went far to justify this clause of the Virginia suffrage plan.

The Virginians who survived the Civil War were generally too poor to give their children the benefits of education. There was then no system of public education at all, nor any common

school system established for a number of years after the close of that struggle.

Without any fault of theirs or of their parents, many of the sons of these veterans had no opportunity whatever to obtain the education necessary to enable them to comply with the otherwise just and reasonable educational qualification prescribed as a permanent requisite to the right to register and vote.

Many of these young men were the sons of soldiers who had lost their lives in battle or by disease during the Civil War, or had survived it with maimed bodies; or, if unharmed in body, without education and without fortune, to confront the ordeal of a desperate struggle for subsistence for the wives and children who, in the midst of a desolated land, fondly awaited their return to their humble homes.

It was believed to be right not to deny suffrage to the sons of such men.

Whether the Constitutional Convention did or did not err in this, its action in this regard was clearly not in conflict with the fifteenth amendment or any provision of the Federal Constitution, and cannot be brought in question in this court.

3. The small property qualification prescribed entitled a very large number of both white and colored citizens to the right of enrollment and of suffrage.

Every white man and every negro who possessed the requisites as to age and residence, and who owned property of any kind on which a tax of as much as one dollar had been paid during the preceding year, was thus admitted to suffrage.

The State tax rate was then forty cents on the $100 of assessed values, so that the effect of this clause was to automatically give the right to vote to all male citizens who owned property of any kind of the aggregate value of $250, on which State taxes had been paid for 1901 or 1902.

Under this provision, many thousands were admitted to the permanent electorate. By far the greater number of these were whites, but there were, as the public records of the State show, thousands of negroes who owned property of the requi-

site value to entitle them to register and vote under this requirement.

There was no color in this provision. The voters whom it enfranchised were not given suffrage because they were whites, or because they were negroes, but because they had such a stake in the Commonwealth, or, in the language of the immortal Bill of Rights of Virginia, because they afforded "sufficient evidence of permanent common interest with and attachment to the community" to entitle them to be clothed with the power, the responsibility, and the trust of suffrage.

A very large majority of the citizens of the State of voting age were, as can be shown, embraced within the terms of the three clauses thus rapidly reviewed, but there remained quite a large number who were neither soldiers nor sons of soldiers, nor owners of property worth two hundred and fifty dollars.

These included a considerable number of men who owned little or no property, some of them more or less educated, others of them without the education of books, but good, intelligent, and worthy citizens, justly entitled to be intrusted with the right of suffrage.

They also embraced the large number of ignorant and vicious men of both races, but, as the census of illiteracy and the statistics of crime show, belonging most largely to the colored population. Among these were the very numerous class known as "cornfield negroes," and also the troublesome and vicious class of negroes, some in the country, but more largely frequenting the towns, who, while ignorant and unmindful of the duties of good citizenship, often had a smattering of education.

The dense ignorance and mischievous traits and propensities of these men rendered it dangerous to the peace and well-being of society to place in their hands a power which they were incompetent to use except to the detriment of the State and to their own serious injury.

The manifest purpose of the convention was, as far as practicable, to get rid of ignorant and debased suffrage and conditions which were a menace to the civilization of the State, and

were injurious as well to the colored as to the white population of the Commonwealth.

The Constitutional Convention, therefore, adopted the qualification expressed in the fourth subdivision of section 19, as a means for excluding, as far as practicable, those who were utterly unfit for the exercise of this most important duty of freemen, and at the same time for enfranchising the intelligent, though often uneducated, citizens who understand the duties of citizenship and can be safely entrusted with the ballot.

This clause admits to suffrage:

> 4. A person able to read, or, whether he can read or not, to understand and give a reasonable explanation of any section of the Constitution submitted to him by the officers of registration.

This is an intelligence qualification, designed to exclude from the electorate citizens who were unfit to be enrolled as voters.

It applies alike, and without any discrimination, to whites and blacks.

If it debars negroes from the right to vote, it does this, not on account of their race or color, but on account of their ignorance of the ordinary duties of citizenship under the government under which they live.

If it shuts out from suffrage more of the negroes than it does of the whites, as is undoubtedly its purpose and effect, it does this because their are many more ignorant negroes and many more negroes who have no conception or comprehension of the government and institutions, and of the simplest and plainest provisions of the organic law of the State, than there are white men who are so profoundly ignorant and incompetent.

Nor is this remarkable. On the contrary, it would be passing strange if the men of that virile Caucasian stock, who wrested Virginia from the wilderness and the savage and founded a civilization there which has radiated its influence to the farthest bounds of the republic, who are sprung from and have enjoyed the inherited benefit of the experience and training of the most

masterful of all the races of mankind, come down to them through the vicissitudes, the trials, and the triumphs of a thousand years, did not possess more of intelligence and more of governmental capacity and comprehension of the duties and the laws of citizenship than the mass of the less fortunate and less richly endowed negro race—"a child-race"—which, as a rule, has had less training and less preparation for citizenship than had the ancestors of their white fellow citizens ten centuries ago.

Whatever else may be said of this "understanding" clause—and there has been much of gratuitous invective wasted in its unjust denunciation—it is beyond any question absolutely free from any repugnance to the fifteenth amendment to our Federal Constitution. Nor is there any other inhibition of that Constitution which it contravenes.

But the question here discussed is no longer an open question in this country. This identical question arose and was settled by the unanimous decision of this court in *Williams* v. *Mississippi*, 170 U. S., 213.

The clause in the Virginia Constitution now being considered is, in the particulars in which the appellants have attempted to impeach it, the same, in meaning and effect, as the clause of the Mississippi Constitution, which was reviewed and sanctioned by this court in *Williams* v. *Mississippi*—the only difference material to the present discussion being one favorable to the Virginia clause—namely, that it is made to operate for less than eighteen months, while that of Mississippi was prescribed as a permanent qualification for suffrage.

The convention evidently had the Mississippi suffrage clause and the decision of this court in *Williams* v. *Mississippi* in view when it adopted this provision substantially in the language of the Mississippi Constitution.

The Mississippi clause is as follows:

> "Sec. 244. On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of the State; or he

> shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A. D. 1892."

This "understanding" clause was unanimously adjudged by this court not to be in conflict with the fifteenth amendment.

The reasoning and the decision of this court in that case conclusively disposes of the main question attempted to be raised in these causes, and establishes the validity of the Virginia suffrage article.

In that case, the plaintiff attacked the validity of the Mississippi "understanding" clause upon substantially the same grounds urged by the appellants in this case, and this court said that the Constitution and the statutes of Mississippi "do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

It would be impossible to conceive of a statute for the registration of voters under which evil administration would not be possible. Not only is this true, but it cannot be denied that there are very few, if any, States of our American Union the administration of whose registration and election laws has not been in many, though generally exceptional, instances characterized by partiality, favoritism, illegality, and sometimes by corruption, fraud, and crime.

This happens not because of any vice in the constitutions or statutes of these States, but because of the imperfection and weakness of human nature and the willingness of some registration and election officers, dominated by bitter political partisanship or by some sordid or venal consideration, to resort to lawless, corrupt, or criminal methods in order to control and carry elections in the interest of faction, of party, or of "the ring."

The vice in such cases is not in the laws, but in their administration. The laws are valid and constitutional, but their administration is, in such cases, illegal.

In the leading case of *Yick Wo* v. *Hopkins,* 118 U. S., 356, Mr. Justice Mathews, in delivering the opinion of this court, carries the doctrine of the effect of the maladministration of an otherwise valid law to the utmost limit, but he defines the proposition he formulates as a "principle of interpretation."

He says (at page 373):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This great jurist had already, in delivering the opinion of this court in that case, demonstrated and held that the ordinances of the city and county of San Francisco, impeached in that cause, were, upon their face, in conflict with the fourteenth amendment, because their manifest and necessary effect was to deprive Yick Wo and other persons in like position with him of their inalienable right to make a livelihood by the conduct of a lawful, honest, harmless, and useful business and trade; that these ordinances were shown by admitted facts to be plainly and illegally discriminating in their operations, and that the mode by which they deprived these Chinese laundrymen of their rights, guaranteed to them by the Federal Constitution and the law of the land, was none the less invalid, for the reason that it was accomplished through the agency of the supervisors of said city and county, because these officials accomplished the purpose of the ordinance, not by the discharge of any definite duty or the exercise of any legitimate and reviewable discretion, but in the unrestrained exercise of arbitrary power.

In describing the power of these supervisors, Mr. Justice Mathews says (at page 366):

> "The power given to them is not confided to their discretion, in the legal sense of that term, but is granted to their mere will. It is merely arbitrary, and acknowledges neither guidance nor restraint."

The facts developed as to the actual administration of the ordinances are referred to, in confirmation of the determination of the court as to the meaning and effect of the text of the ordinances, and the language cited above is used in the definition of the rule as to the propriety of interpreting laws in the light of their practical operation; but we do not understand the learned judge to hold, or this court ever to have decided, that a valid and constitutional law will be rendered unconstitutional and void by a vicious, lawless, or unconstitutional administration of such law.

A fair and reasonable construction of the language of Mr. Justice Mathews, quoted above, is that if a law, fair and valid on its face, "be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust discriminations between persons in similar circumstances, material to their rights, the denial of equal justice" (by such evil administration of the law) "is still within the prohibition of the Constitution."

We are unwilling to believe that this court will ever take the illogical and fallacious position that any valid and constitutional enactment can ever be made unconstitutional and void by the unlawful, partial, and unconstitutional administration of such law. If so, there can hardly a law be pointed out, either Federal or State, which would not go down before such a rule; for there is no law, capable of being maladministered, which will not ordinarily be maladministered sometimes, and we know that the most salutary statutes are often so abused by those charged with the duty of their execution.

But, again, the case presented by the Virginia intelligence qualification for suffrage, whenever it shall be properly and

fairly brought under review in this court, will be found not to be included in the rule laid down by Mr. Justice Mathews, whatever the construction of that rule may be; for this court, in *Williams* v. *Mississippi,* 170 U. S. (at page 223), expressly held as to an "understanding" clause identical, as to the principle involved, with that of Virginia:

> "We do not think that this case is brought within the ruling in *Yick Wo* v. *Hopkins, Sheriff,* 118 U. S., 356."

It is further to be remarked that this clause of the Virginia Constitution is to be distinguished from the San Francisco anti-Chinese ordinances in this, that the Virginia enactment did not vest any arbitrary power in the officers who were to execute it, but clothed them with discretionary power, to be exercised fairly, justly, and impartially; devolved upon these registration officers a duty, coupled with this discretion, in the discharge of which duty their action could be reviewed and controlled by the courts; gives to any citizen whose rights are denied or abridged by any act of the officers of registration a simple, an inexpensive, and a summary remedy for the prompt redress of such wrong; and that the Virginia statute holds these registration officers to a strict accountability for any wilful infraction of duty, by denouncing and punishing any such misconduct as a crime.

Section 19 of the Constitution provides:

> "Any person denied registration under this section shall have the right of appeal to the Circuit Court of his county, or the Corporation Court of his city, or the judge thereof in vacation."

And section 7 of the registration ordinance is as follows:

> "Sec. 7. Any person denied registration shall have the right to appeal, without payment of writ

tax or giving security for costs, to the Circuit Court of the county or to the Corporation Court of the city in which he offers to register, or to the judge thereof in vacation, by presenting to such court or judge, within ten days thereafter, a petition in writing to have his right to register determined, containing a statement of the facts proved before said board; to which the board shall make answer in writing. The matter shall be heard and determined upon such petition and answer, and such evidence as may be introduced in support thereof. Such proceedings shall take precedence over all other business of the said court or judge, and shall be heard as soon as possible.

"Upon the filing of such petition, the clerk of the court shall at once give notice to the Commonwealth's attorney for his county or city, whose duty it shall be to appear and defend against said petition in behalf of the State.

"Judgment in favor of the petitioner shall entitle him to registration. From judgment rendered against him, a writ of error shall lie to the Supreme Court of Appeals in favor (of) the petitioner."

And section 3854 of the Code of Virginia punishes any fraudulent or wilful registration or refusal to register a qualified voter in the following terms:

"Sec. 3854. *Wilfully Rejecting or Corruptly Registering a Voter; How Punished.*—If any registrar wilfully or maliciously reject from registration, or corruptly register any person, contrary to law, he shall be fined not less than fifty nor more than one hundred dollars, and be confined in jail not less than three nor more than twelve months."

So that the Virginia suffrage article and her election laws, not only are not framed so as to be necessarily maladministered, but any wrongful administration of them—any administration of them "with an evil eye"—is guarded against and prevented by making and punishing such acts as crimes.

The "understanding" clauses of the Mississippi Constitution and of the Virginia Constitution have been criticised because of their alleged indefiniteness and capability of maladministration. I know of no provision in the Constitution of the United States which prohibits a State from adopting an indefinite qualification of suffrage. As has been already shown, the provision here referred to is an intelligence qualification.

It is a qualification certainly as reasonable and just and as capable of exact and impartial administration as the suffrage requirements of some of the other States of the Union. Let us consider some of these.

In Connecticut, the qualifications for suffrage have been, as I understand, since 1845, and substantially in its present form for more than a century, as follows:

> "Every white male citizen of the United States who shall have attained the age of twenty-one years, who shall have resided in this State for a term of one year next preceding, and in the town in which he may offer himself to be admitted to the privileges of an elector at least six months next preceding the time he may so offer himself, and SHALL SUSTAIN A GOOD MORAL CHARACTER, shall, on his taking such oaths as may be prescribed by law, be an elector."

In order to vote in that State, the citizen must not only possess these qualifications, but that fact must be passed upon by the selectmen of the town in which he lives before he can be admitted as an elector. The requirement that he "shall sustain a good moral character" is certainly as indefinite and

as liable to maladministration as the "understanding" clause of the Virginia Constitution.

In Minnesota, by the third subsection of section 1 of Article VII., the following classes of citizens are admitted as voters—viz:

> "*Third.* Persons of mixed white and Indian blood, *who have adopted the customs and habits of civilization.*
>
> *Fourth.* Persons of Indian blood residing in this State, who have adopted the language, customs, and habits of civilization, after an examination before any district court of the State, in such manner as may be provided by law, *and shall have been pronounced by said court capable of enjoying the rights of citizenship within the State.*"

And in Vermont, the qualifications for suffrage were, until recently, and so far as I can learn at present are, as follows:

> "Every man of the full age of twenty-one years, having resided in this State for the space of one whole year next before the election of representatives, *and is of a quiet and peaceable behavior,* and will take the following oath or affirmation, * * * shall be entitled to all the privileges of a freeman of this State."

In Idaho the restrictions upon suffrage are expressed in her Constitution as follows:

> "Sec. 3. No person is permitted to vote, serve as a juror, or hold any civil office who is under guardianship, idiotic, or insane, or who has at any place been convicted of treason, felony, embezzlement of the public funds, bartering or selling, or offering to barter or sell, his vote, or

purchasing, or offering to purchase, the vote of another, or other infamous crime, and who has not been restored to the rights of citizenship, or who at the time of such election is confined in prison on conviction of a criminal offense, or who is a bigamist or polygamist, or is living in what is known as patriarchal, plural, or celestial marriage, or in violation of any law of this State, or of the United States, forbidding any such crime; or who, in any manner, teaches, counsels, aids, or encourages any person to enter into bigamy, polygamy, or such patriarchal, plural, or celestial marriage, or to live in violation of any such law, or to commit any such crime; or who is a member of or contributes to the support, aid or encouragement of any order, organization, association, corporation, or society which teaches, advises, counsels, encourages, or aids any person to enter into bigamy, polygamy, or such patriarchal or plural marriages; or which teaches or advises that the laws of this State prescribing rules of civil conduct are not the supreme law of the State; nor shall Chinese, or persons of Mongolian descent, not born in the United States, nor Indians not taxed, who have not severed their tribal relations and adopted the habits of civilization, either vote, serve as jurors, or hold any civil office."

Other suffrage articles adopted in the past by the free States of this Union, and some that are now administered without question, have been equally indefinite or exacting in their requirements with those embraced in Article II. of the Virginia Constitution, and equally susceptible of maladministration.

A comparison of those which I have cited—particularly that of the good State of Connecticut, and that of the Green Mountain State—with the Virginia suffrage clause, will show that the latter is no more obnoxious to criticism, and is as

clearly within the competency of State enactment as those which now for quite a hundred years have regulated the elective franchise in the States referred to.

This discussion has been confined to the qualifications for suffrage prescribed for the voters regstered in 1902 and 1903, under the registration ordinance and section 19 of the Constitution, which are the only provisions which are attacked in these suits.

It will be observed that those requirements no longer apply after 1903. After January 1, 1904, the qualifications for registration and voting are defined in sections 20, 21, and 22 of the Constitution, as follows:

> "Sec. 20. After the first day of January, nineteen hundred and four, every male citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register: provided—
>
> "First. That he has personally paid to the proper officer all State poll taxes assessed or assessable against him, under this or the former Constitution, for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents in satisfaction of the first year's poll tax assessable against him; and,
>
> "Second. That, unless physically unable, he make application to register in his own handwriting, without aid, suggestion, or memorandum, in the presence of the registration officers, stating therein his name, age, date and place of birth, residence and occupation at the time and for the two years next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; and,

"Third. That he answer on oath any and all questions affecting his qualifications as an elector submitted to him by the officers of registration, which questions, and his answers thereto, shall be reduced to writing, certified by the said officers, and preserved as a part of their official records.

"Sec. 21. Any person registered under either of the last two sections, shall have the right to vote for members of the General Assembly and all officers elective by the people, subject to the following conditions:

"That he, unless exempted by section twenty-two, shall, as a prerequisite to the right to vote after the first day of January, nineteen hundred and four, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under this Constitution, during the three years next preceding that in which he offers to vote: provided, that if he register after the first day of January, nineteen hundred and four, he shall, unless physically unable, prepare and deposit his ballot without aid, on such printed form as the law may prescribe; but any voter registered prior to that date may be aided in the preparation of his ballot by such officer of election as he himself may designate.

"Sec. 22. No person who, during the late war between the States, served in the army or navy of the United States, or the Confederate States, or any State of the United States, or of the Confederate States, shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote."

* * * * * * *

The present and permanent requirements are simply that the citizen shall (1) be able to read and write, and, as a test of this, shall make application in his own handwriting, without aid from anyone, to be registered, and shall answer all questions affecting his qualifications as an elector, and (2) that he shall have paid the State poll tax of $1.50, assessed or assessable against him, for the three preceding years.

These requirements apply to all persons alike. Those who failed to apply for registration, or who were rejected in 1902 or 1903, may still apply, and if they have paid the prescribed poll taxes, and make written application to be registered, they are entitled to be registered this year, or next year, or at any future time. The door is always open to them, provided they comply with the definite requirements prescribed for all registrations after 1903.

In concluding this branch of the discussion, I may be permitted to say that the argument for the appellants is founded upon the fallacy that the right to vote is a natural, a primary, and an absolute right. It is unnecessary in this court to refute such a proposition, for it is, and has been too often, settled that suffrage is a relative, and a purely statutory right, which is the possession of only those upon whom organized society, or the State, may see proper to confer it. If this were not true, all of the members of the body politic, of whatever age, or sex, or mental status, would be entitled to an equal voice in the government. Under the fundamental law of this representative republic, the State has the right to deny this power to any of its citizens whom it considers that it would be unsafe or unwise to entrust with its exercise; and the only limitation upon this right is that it shall not be used so as to exclude from suffrage any citizen merely on account of his race, or his color, or his previous condition of servitude.

III.

I have thus, as succinctly as was practicable, reviewed all of the main contentions of appellants' counsel.

From this refutation of the propositions for which he contends, it follows necessarily that the Constitution of 1901-2 is the Constitution of the Commonwealth of Virginia; that the suffrage article embraced in that Constitution, being absolutely free from any discrimination on account of race, color, or previous condition of servitude, is a valid and constitutional exercise of the power of the State over that subject; and, as a consequence, that the registration ordinance, and the registration of voters made thereunder, and the election held under the laws of Virginia in November, 1902, were legal and constitutional.

It is proper that I should add here that the registration ordinance adopted by the convention was not only recognized, but, in its most material particulars, re-enacted and adopted by the *de jure* Legislature of the State, at its session in July and August, 1902, thus giving them the sanction, not only of the convention, but also of the General Assembly.

IV.

This brings us to consider the question of the right of these plaintiffs to maintain these suits. In the foregoing portion of this argument, I have endeavored to show that the provisions of the Virginia Constitution complained of did not invade any of the rights of the appellants or of any other citizens of the Commonwealth.

As to these particular complainants, it is a remarkable circumstance in these cases that none of the complainants in either of these suits was disfranchised by the new Constitution of Virginia. Every one of them, except Gilpin, according to the averments of their bill and petition, came within the terms of one or the other of the clauses prescribing automatic qualifications, and was entitled to be registered and to vote. In

the prohibition suit, Jones and Hill were owners and taxpayers as to property valued at $800 and $500, respectively. Lee, the remaining plaintiff in that action, was a veteran of the Indian wars. See p. 12 of Record, in Case No. 189. And of the appellants in the suit in equity, Anderson was a veteran of the Spanish-American War, and was actually registered as such, though with the wrong initial; Selden owned and paid taxes on $1,500 worth of real estate; and Gilpin, upon the allegations of the bill, was qualified under the intelligence clause.

Conceding, for the moment, for the purpose of argument, that the plaintiffs have been deprived of their right to vote on account of race, color, or previous condition of servitude, it is confidently submitted that they have mistaken their remedy for the redress of any such alleged wrong. This will abundantly appear from an application of the principles so often settled by this court, but never more clearly than in the case of *Cunningham* v. *Railroad Co.*, 109 U. S., 446, relied upon in our brief and cited at page 70 of appellants' brief.

In proposition No. 2, of Mr. Justice Miller, who delivered the opinion in that case, he says:

> "2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government.
>
> "In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him."

The appellants' counsel relies upon this doctrine. It is sufficient to say, in reply, that neither of these cases comes within the rule laid down by the learned judge, *for the simple reason that neither of these suits is an action of tort.*

There can be no question that, in a proper case, an action for damages against election officers would lie, as was settled by this court in *Wiley* v. *Sinkler,* 179 U. S., 58, and in *Swafford* v. *Templeton,* 185 U. S., 487. And such an action is the proper and only remedy in the United States Circuit Courts in any such case.

The third proposition of Mr. Justice Miller is as follows:

> "3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process."

And neither of these cases can be brought within the limits of the rule thus clearly laid down.

The duty and function of the State Board of Canvassers, with the discharge of which it was the object of these suits to interfere, cannot be considered duties in regard to a specific matter not affecting the general powers or functions of the government; nor were they duties in the performance of which one or more individuals have *a distinct interest capable of enforcement by judicial process;* but they were matters of purely governmental concern, affecting the interest of the whole people, not only of each congressional district, but of the entire State and of the entire nation.

The counsel for the plaintiffs has failed to draw the distinction between actions in tort and suits in prohibition, and between actions of tort and a suit in equity, and his entire contention is based upon his failure to distinguish between civil rights and political rights.

The rights here sought to be asserted are not, and have never been held to be, civil rights; though, under the act of Congress, as shown in our preliminary brief, the wilful and wrongful

deprivation of a citizen of his right to vote in any particular instance, constitutes a tort, for the redress of which the citizen, so wrongfully deprived, may have his action for damages in a proper case in the United States Circuit Courts against the wrongdoer; but Congress has never conferred upon the Circuit Courts of the United States jurisdiction in a suit in equity over political questions and governmental questions. And such is the character of the jurisdiction which the appellants would seek to invoke in this case. In all such cases the Constitution and the laws of Congress have wisely left the entire control of the subject, in so far as the Federal Government is vested with the right to control it, with the political departments of the government, which alone can decide whether the State has a government republican in form, and take measures to make good that guarantee of the National Constitution. And such seems to be the wise and just conclusions of this court in *Cunningham* v. *Railroad Co.*, 109 U. S., 446; *Louisiana* v. *Jumel*, 107 U. S., 711; *Hagood* v. *Southern*, 117 U. S., 52, and in the recent cases of *Giles* v. *Harris*, 189 U. S., 475.

The rule, as clearly stated by Mr. Justice Harlan in *Fitts, Attorney-General of Alabama*, v. *McGhee*, 172 U. S., 516, 529, 530, aptly applies to this litigation.

> "There is a wide difference between a suit against individuals holding official positions under a State to prevent them, under the sanction of an unconstitutional statute, from committing, by some positive act, A WRONG OR TRESPASS, *and a suit against officers of a State merely to test the constitutionality of a State statute* (italics mine) in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because

> they were law officers of the State, a case could be made out for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the Legislature could be tested by a suit against the Governor and Attorney-General, based upon the theory that the former, as Executive of the State, was, in a general sense, charged with the execution of all its laws, and that the latter, as Attorney-General, might represent the State in litigation involving the enforcement of its statutes. *That would be a very convenient way for obtaining a judicial determination of questions of constitutional law which may be raised by individuals; but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their consent, be brought into any court at the suit of private persons.* (Italics mine.) If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong."

Here it would have been impossible for the defendants in the court below to have done any act, in the discharge of the official and governmental functions devolved upon them as members of the State Canvassing Board, which would have constituted a tort or trespass upon any right of any of these complainants.

None of the complainants could have any distinct personal interest in the canvassing and return of the votes cast at the congressional election held in Virginia in November, 1902. The candidates for Congress in the several Virginia districts alone had any distinct personal interest in that matter. The only interest which any of the complainants could have had in

the premises was one of a general and public character, not personal to them, but possessed in common with all of the other citizens of the Commonwealth. Any injury to any such common, general, and public interest could not constitute a personal trespass or tort in respect to any individual citizen, to be redressed by an action for damages, or prevented by injunction in equity, or by writ of prohibition, for the conclusive reason, among others, that the individual citizen has no distinct personal interest in the subject.

If any other rule should be adopted, the very wheels of government might at any time be stopped at the suit of any individual who had a fancied or a real grievance because of the administration of some obnoxious law.

THE PROHIBITION SUIT.

I need not consume time in showing that this action could not be entertained by the court below. As shown in our brief in that case, the authorities establish the proposition that no court, and particularly no Federal court, has jurisdiction of a writ of prohibition in any such case.

High on Extraordinary Remedies, sections 787, 787*a*;
Bath County v. *Amy*, 13 Wall., 244;
Ex Parte City Bank of New Orleans, 3 How., 292, 322;
Louisiana v. *Jumel*, 107 U. S., 727;
2 Spelling Extraordinary Relief, sections 1367, 1722, 1732, and 1737;
1 Desty Fed. Procedure (9th Ed.), section 84, p. 341, and citations;
Burch v. *Hardwicke*, 23 Gratt., 51, 60.

As has already been shown, however, the right of neither the plaintiffs nor of any other citizens of the State to vote has been abridged or denied by the terms or normal and lawful opera-

tion of the suffrage article of the Virginia Constitution, on account of race, color, or previous condition of servitude.

V.

I have not deemed it necessary to reply to the fierce assault made by counsel for the appellants upon the members of the Constitutional Convention who voted to ordain the Constitution, nor to much of that portion of his discussion of this case, which smacks of the bitterness of party and partisan politics, and can have no proper place in this court, and no possible proper bearing upon the great questions of constitutional law presented by the records of these cases.

In reference to the charge of perfidy made against those delegates, I will only say that it is made against gentlemen of as exalted character as can be found anywhere on earth, and that the charge is founded upon an absolute misapprehension of the facts and of the relations of those gentlemen to the subject and to their respective constituents. They were not chosen as members of the Constitutional Convention by any convention of any political party. The unit of representation of that convention was the legislative district; and each delegate to that convention was there as the deputy of the people of the district by whose votes he was chosen. They were not chosen by the State Convention of any party, and were not accountable to any such convention, but to the people of their respective districts. Many of them were elected upon the distinct understanding between them and the constituencies who selected them that if a satisfactory Constitution should be framed by the convention—a Constitution which, in the judgment of the delegate, protected the liberties and promoted the welfare of the State—the delegate would vote to ordain the Constitution. Although nearly two years have elapsed since that Constitution was enacted by the convention, it is a part of the history of the State that it has never been shown, or attempted to be shown, that a single delegate who voted for its enactment violated any pledge or assurance given to the con-

stituency which he represented, or any instructions, express or implied, given by them to him.

The resolution for the ordainment of the Constitution by the convention, as the journal of the convention shows, met the sanction not only of the forty-seven members whose votes were recorded in the affirmative upon that proposition, but also of six other members who were paired upon that question with six of the opponents of proclamation. So that, as the journal of the convention shows, fifty-three out of the ninety-eight delegates whose judgment was expressed upon the question were in favor of the enactment of the Constitution; and two out of the twelve Republican members of the convention were recorded among those voting for proclamation.

The resolution for the enactment of the Constitution was passed on the 29th of May, 1902. Afterwards, upon the 6th of June, 1902, as appears from the journal of the convention, the Constitution, which had then been practically ordained, was approved as the organic law of the Commonwealth by a vote of ninety to ten. So that the Constitution as a whole and in all of its provisions received the affirmative sanction of nine-tenths of the members of the convention; though, as appears from the journal of the convention, only fifty-three of those members were in favor of its ordainment by the convention.

These are matters which have little, if any, bearing upon the questions at issue, and are referred to only because of the erroneous statements and conclusions of the counsel for the appellants in regard to them.

VI.

The immediate and the remote consequences involved in the decision of the issues here outlined are so momentous that they challenge the most earnest consideration of the jurist, the patriot, and the philanthropist.

It is true that they involve the question of suffrage, so far as the right to its exercise is based upon intelligence, the possession of property, or upon military service in time of war. In this way it affects the descendants of the African and of the

Caucasian races without any unconstitutional discrimination; for the State, in making any distinction, has seized upon characteristics which are, in a large degree, possessed by both races. But its adjudication will not only in this way affect the subject of Caucasian suffrage and African suffrage in the States of the American Union, but it will affect the question also of Mongolian and Malayan suffrage, which is looming up into portentous importance upon the horizon of the future.

In its determination this court will be asked to pronounce the Constitution and the suffrage article, deliberately framed by the deputies of the Virginia people, to be unconstitutional and void, and thereby to bring about a condition of chaos in that Commonwealth, with results the disastrous effects of which it would be difficult to exaggerate.

We know that this court should not, and will not, hesitate to decide any question of which it has adequate jurisdiction, according to the right—even one involving such consequences—where the unconstitutionality of a law has been clearly established. But we most earnestly submit that it will not do this in any case of doubt; that, even if it was not manifest, as we believe it to be here, that there is no discrimination in this suffrage article on account of race, or color, or previous condition of servitude, this court would pause before it would hold such an act of a State to be unconstitutional.

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Mr. Chief Justice Waite, in Sinking-Fund Cases, 99 U. S., 718.
>
> "The courts should not declare a statute unconstitutional unless its unconstitutionality is clear beyond any reasonable doubt." Allen, J., in *People* v. *Allenston*, 55 N. Y., 54.

Such is the established rule which governs in the construction of an ordinary statute enacted by the Legislature of a State.

How much more strongly do the principles upon which it is founded apply to the solemn and deliberate enactment of any provision of their organic law by the delegates of a people in convention assembled!

Such an enactment must stand "unless its unconstitutionality is clear beyond any reasonable doubt."

Still less will the courts adjudge the enactment to be invalid where, as is the case here, it is manifestly not in contravention of the Federal Constitution.

CONCLUSION.

It is impossible to calmly and dispassionately consider the questions here discussed without being forced to the conclusion that they are questions of a political character, affecting not only governmental action, but the fundamental political rights of the people of the State, and their relations to their governments, State and national, in such a manner and to such a degree that any adequate relief is entirely outside of the province of the courts; and that the remedy in any such case, if a wrong has been perpetrated, can only be afforded and administered by the political department of the government, or by the people themselves in their organized political capacity.

The arguments and considerations which should determine the action to be taken are such as address themselves to the legislative mind, and are not such as can be given due effect by a purely judicial tribunal.

Such matters are clearly within the domain of political and legislative action, where, however injurious the consequences of the measure adopted may be, certain political and probable social chaos and confusion and disaster can alone be remedied or mitigated.

It is right, therefore, that the courts should not take jurisdiction of this case, or of any other case involving the political rights, the existence of the organized government, and the governmental functions of the people of a State within the sphere of State action and jurisdiction.

For Virginia, the real defendant in these suits, I ask leave to say that it is one of the thirteen original sovereign States of the American Union which has been attempted to be arraigned as a culprit here—one of those heroic Commonwealths in the very blood of whose sons the foundations of that Union were cemented.

A great historian, perhaps the most philosophic and the most discriminating, as well as the most accurate, of all who have written the story of the birth and growth of this great Republic of free American Commonwealths, the lamented John Fiske, a son of New England, reared in a New England environment, trained in the culture of New England schools, with a mind exact in the comprehension and intrepid in the cause of truth, has written that, there were six men who could be selected from their contemporaries and named as the real architects of the American Republic. Shall I repeat their names as he has written them, and as they must be forever blazoned across the pages of truthful history? They are Washington, Madison, Hamilton, Jefferson, Henry, and Marshall. Five of these six immortals were the sons of that Commonwealth which counsel for appellants would have this court degrade by a decree declaring that she occupies an inferior position in the sisterhood of States—the Republic which she, in large measure, created.

Is any man bold enough in imagination to suppose that such suits as these would ever have been brought against the great States of New York, or Massachusetts, or Pennsylvania, or against the States of Connecticut, or Rhode Island, which though small in territory, are great also in the achievements of their sons in the cause of liberty and progress?

Freedom—freedom of governmental action within the legitimate field of State control, freedom from any ban of political proscription, absolute freedom within the domain of local self-

government—is essential to the normal growth and the untrammelled development of a State and its people.

Without such freedom of action, the Commonwealth must be dwarfed and weakened, and handicapped in any upward progress.

If the shackles which counsel for appellants has forged and would have this court fasten upon the fair free limbs of Virginia, and to chain her to the body of an ignorant, debased, and incompetent electorate, are broken and crushed forever by its decision in these causes; if, by your decree and by the concurrent action of the political departments of the National Government, she is bid go free from threatened humiliation, and her people given this guaranty, that she is, in fact as well as in theory, the acknowledged peer of any other State of this Union of States, then will her people take fresh hope, and with new life and high ambition advance upon a career of patriotic usefulness and economic achievement, so that in the not very distant future we may confidently hope to see this ancient Commonwealth, venerable in years but young in the vigor and the potentialities of her present and her future, leap to her rightful place in the front rank among the States of the Republic—her sons, as of yore, illustrious in patriotic service, foremost in the counsels of the nation, gloriously leading its army, or commanding its battle-ships in righteous and victorious war, perchance worthily wearing the ermine as members of this august tribunal, or wielding ably, bravely, wisely, and well, for the common good of all the people of all the States, the great powers of the Chief Executive of our reunited country.

Supreme Court of the United States.

No. 189.—October Term, 1903.

William H. Jones, John Hill, and Edgar Poe Lee, Plaintiffs in Error,
vs.
Andrew J. Montague, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia, et al.

In error to the Circuit Court of the United States for the Eastern District of Virginia.

[April 25, 1904.]

On November 14, 1902, plaintiffs in error filed in the Circuit Court of the United States for the Eastern District of Virginia, in behalf of themselves and others similarly situated, their petition for a writ of prohibition. The petition set forth that the petitioners were citizens of the United States, citizens and residents of the State of Virginia, and of the third Congressional district of that State, and entitled to vote at the election held on November 4, 1902, for a member of the House of Representatives of the United States from that district; that they applied to the proper registration board for registration and were refused. It was further alleged that in 1901 a constitutional convention was assembled in Virginia; that it framed a new constitution; that it did not submit such constitution to the people for approval, but by a vote of forty-seven to thirty-eight ordained it as the organic law of the State. Attached to the petition were copies of the constitution, of a schedule making provisions for putting in force the new constitution without inconvenience, and of an ordinance providing for the registration of voters, all of which were adopted by the same convention. The petitioners also charge that the purpose of the party in power was the disfranchisement of the colored voters of the State, and specifically set forth how this disfranchisement was to be accomplished. They averred that at the election held on November 4, 1902, only the registration lists provided for by the ordinance were recognized; that abstracts of the votes cast in the several cities and counties were certified to the Secretary of the Commonwealth, at Richmond, Virginia, and that the defendants, as the board of State canvassers, would assemble on the 24th of November, 1902, and would, unless prohibited, canvass the election returns, declare the result and give certificates to the parties found to be elected. The prayer of the petition was that a writ of petition issue to the defendants "prohibiting them, and each of them, from considering, canvassing, counting, determining upon, or certifying or otherwise acting upon, any returns

or abstracts of returns in the office of the Secretary of the Commonwealth of Virginia, purporting to be returns of election held in the State of Virginia, Tuesday, November 4, 1902, for representatives in Congress from the State of Virginia, or in any wise dealing with or certifying the results of said returns as returns of a lawful election, held in Virginia on the date aforesaid. That by reason of the matters and things hereinabove set forth, said pretended election, and any and all precinct, county, district or State returns made thereunder, may be held to be null, void and of no effect, and the said board of State canvassers, and the members thereof, may be prohibited from in any wise proceeding to act upon the same as lawfully before them for their consideration. That pending the hearing, and until the final decision upon this petition for said writ of prohibition, an order may be granted by this honorable court suspending any and all proceedings, on the part of said board of State canvassers and the members thereof, upon any and all of the matters sought to be prohibited until the final decision of this cause. And for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual."

After answer by defendants the writ of prohibition was denied by the Circuit Court and the petition dismissed. The dismissal was based on a want of jurisdiction, whereupon the petitioners brought the case on error directly to this court. A motion has here been made to dismiss the writ of error on the ground that everything sought to be prohibited has already been done, and that there is nothing upon which any order of the court can operate. In support of the motion an affidavit of the Secretary of the Commonwealth has been filed, to the effect that after the dismissal of the petition by the Circuit Court the board of canvassers convened at the office of the Secretary in accordance with the law of the State, and upon the returns then on file canvassed the votes, determined the parties found by such canvass to have been elected, and that a certificate to that effect had been prepared and transmitted to each of the persons declared to have been elected a representative in Congress from the State of Virginia.

Mr. Justice BREWER delivered the opinion of the Court.

Mills v. *Green* (159 U. S. 651) is decisive, and compels a dismissal of the writ of error. That was a suit in equity, alleging the calling of a convention to revise the constitution of South Carolina and seeking to enjoin an alleged illegal, partial and void registration by which the plaintiff, and others like him, would be deprived of the right to vote for delegates to the convention. An injunction was granted by the Circuit Court, but was dissolved by the Circuit Court of Appeals and the suit dismissed. Thereupon the election was held, the convention met and entered upon the discharge of its duties. An appeal to this court from the order of

dismissal made by the Circuit Court of Appeals was dismissed on the ground that the object of the suit could no longer be attained. Mr. Justice Gray, delivering the opinion, said (pp. 653, 657, 658):

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. . . . In the case at bar the whole object of the bill was to secure a right to vote at the election, to be held, as the bill alleged, on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the Circuit Court of Appeals dismissing his bill, that date had passed; and, before the entry of the appeal in this court, the convention had assembled, pursuant to the statute of South Carolina of 1894, by which the convention had been called. (21 Stat. S. C. pp. 802, 803.) The election of the delegates and the assembling of the convention are public matters, to be taken notice of by the court, without formal plea or proof. . . . It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the Circuit Court, no relief within the scope of the bill could now be granted."

See also *Codlin* v. *Kohlhausen*, (181 U. S. 151;) *Tennessee* v. *Condon*, (189 U. S. 64.)

The case before us is one in prohibition. It is so declared by the petitioners in their petition, and the thing sought to be prohibited was a canvass of the votes cast at the election on November 4, 1902. The facts alleged in respect to the constitution, the purpose of the dominant party, the action of the convention, the refusal to submit the proposed constitution to the vote of the people, and the registration ordinance, were all stated for the purpose of showing that the election on November 4, 1902, was illegal, and that there ought to be no canvass of the returns cast at that election. The prayer of the petitioners specifically is to restrain such canvass. Even the general clause at the close of the prayer is "for such other and further orders in the premises as shall and may make the prayer of your petitioners effectual." But—as shown by the affidavit, and as indeed we might perhaps take judicial notice by the presence in the House of Representatives of the individuals elected at that election from the various Congressional districts of Virginia—the thing sought to be prohibited has been done and cannot be undone by any order of court. The canvass has been made, certificates of election have been issued, the House of Representatives (which is the sole judge of the qualifications of its members) has admitted the parties holding the certificates to seats in

that body, and any adjudication which this court might make would be only an ineffectual decision of the question whether or not these petitioners were wronged by what has been fully accomplished. Under those circumstances there is nothing but a moot case remaining, and the motion to dismiss must be sustained.

Dismissed without costs to either party.

No. 190.

William S. Selden, William H. Anderson, and Clarence B. Gilpin, Appellants, *vs.* Andrew J. Montague, Governor of Virginia; David Q. Eggleston, Secretary of the Commonwealth of Virginia; Morton Marye, Auditor of Public Accounts of Virginia, et al.	Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

[April 25, 1904.]

Mr. Justice BREWER delivered the opinion of the Court.

This is a suit in equity brought to obtain by injunction the same relief as was sought in the preceding case. The facts and conditions are substantially similar, and for the reasons there given the appeal will be dismissed without costs to either party.

True copy.

Test:

Clerk Supreme Court, U. S.